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The *Yale Law Journal* calls attention to two cases recently decided, which are interesting as showing how litigation based on a similar state of facts may lead to directly opposite results in different States. The cases referred to are Yordy v. Marshall County (Iowa), 53 N. W. Rep. 298, and Clulow v. McClelland (Pa.), 25 Atl. Rep. 147. In each instance an action was brought to recover damages for injuries to a steam threshing machine, caused by the breaking of a bridge on the highway. Each court referred with approval to the doctrine laid down in McCormick v. Township of Washington, 112 Pa. St. 185, that the "township is not required to assume that its bridges will be used in an unusual manner, either by crossing at great speed or by the passing of a very large and unusual weight." The point therefore on which the decisions turned was whether it was an unusual use of bridges to transport steam threshing machines over them. In the Iowa case it was held that whether such use was unusual and extraordinary was for the jury to decide and a verdict in favor of the plaintiff was sustained. But in the Pennsylvania case the court decided that the use was unusual as a matter of law and that the judgment of the lower court against the plaintiff should be affirmed. Chief Justice Paxson remarked, however, that when the transportation of such machines over bridges should become so frequent in that State as to amount to an ordinary use "it may be necessary to strengthen the bridges so as to withstand the increased strain."

The contention between telephone and electric railway companies, which has become quite common in this country, as to which, if either, "owns the earth" has just made its appearance in England in the case of the National Telephone Company v. Baker, which came before Justice Kekewich. The plaintiff there is a telephone company which uses the single wire system in which the earth is used as a return conductor and which is peculiarly liable to be disturbed by leakage and induction. The electric railway line of the defendant is worked on what is known as the "trolley" system which in spite of its great merits is apt to create electrical disturbances. Shortly after the defendant's railway was opened for traffic, the plaintiffs' circuits were seriously disturbed by the frequent discharges into the earth within their electrical field of the powerful electrical currents which the working of the trolley system involves. Sometimes the telephones were absolutely inaudible. At other times they gave forth a humming sound which considerably impaired their use. Thereupon the plaintiffs commenced an action for an injunction. The existence of the nuisance was clearly proved at the trial and the justice whilst deciding against the plaintiffs on another ground gave judgment against the defendant on the main question. In the leading case of Rylands v. Fletcher, it was decided by the House of Lords on appeal that "where the owner of land brings upon it anything which would not naturally come there and which is in itself dangerous and may become mischievous if not kept under proper control though in so doing he may act without personal wilfullness or negligence, he will be liable in damages for any mischief that it may occasion."

The authority of this case could not be denied in the telephone case. But the defendant among other ingenious arguments maintained that as the science of electricity was still in comparative infancy when the doctrine of Rylands v. Fletcher was laid down, an electrical current was not within its scope. The justice, however, promptly and properly overruled this contention. The principle that extraordinary or non-natural user of land has special responsibilities attached to it is as applicable to a current of electricity as it is to a current of water or a heap of chemical refuse; and in Rylands v. Fletcher, the judges were careful to avoid the employment of what could limit its application to the particular circumstances before them.

## NOTES OF RECENT DECISIONS.

CRIMINAL PRACTICE — INDICTMENT — DISQUALIFICATION OF GRAND JUROR.—In Commonwealth v. Woodward, the Supreme Judicial Court of Massachusetts, hold that an indictment is not bad merely because one of

the grand jurors by whom it was found before the meeting of the jury, made a personal investigation into the guilt of the accused and secreted himself in a room with an officer for the purpose of listening to declarations and admissions of the accused and heard the same and listened to statements of officers as to his guilt and believed him guilty. Allen, J., says:

We are of opinion that these facts constitute no legal objection to the validity of the indictment. This opinion is in accordance with what appears to us to be the clear weight of judicial decision elsewhere, though in some instances views to the contrary have been held. It is, however, to be borne in mind that, in examining the decisions of different tribunals in reference to the position, functions, and proper methods of discharging the duties of grand jurors, it is necessary to know the statutory law under which those decisions have been rendered, in order rightly to understand them. For example, as we understand it, in New York a grand jury can receive but legal evidence (Code Crim. Proc. §§ 255-257), while in Connecticut it is the duty of each grand juror, before the grand jury come together, to make a personal investigation of all offenses that come to his knowledge (Gen. St. Conn., Revision 1887, ch. 12; Watson v. Hall, 46 Conn. 204). In Massachusetts there is no statute defining the duties of grand jurors, except so far as the same may be gathered from their oath of office. This oath is as follows: "You, as grand jurors of this inquest, for the body of this county of ——, do solemnly swear that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge. The commonwealth's counsel, your fellows', and your own, you shall keep secret. You shall present no man for envy, hatred, or malice; neither shall you leave any man unpresented for love, fear, favor, affection, or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God." Pub. St. ch. 213, § 5. This is substantially the form of the oath which has long been administered in England; and there, as here, the grand jury is deemed to be an informing and accusing body, rather than a judicial tribunal. 4 Bl. Comm. 298, 300; Justice Field's charge, 2 Sawy. 667. There are evils no doubt which would arise if a general practice were to spring up of importuning grand jurors privately in favor of or against the finding of indictments. If this were done on one side, it might also be done on the other; if, with one grand juror, then with all; if by one person, then by many persons; if in one case than in all cases. The evil or apprehension of evil from this source has been so great elsewhere as sometimes to lead to legislation for preventing or punishing it. People v. Sellick, 4 N. Y. Crim. Rep. 329. No such legislation has yet been deemed necessary in this commonwealth, and the question of the criminality of such importuning, if it should arise, would have to be determined on general principles of law. In the present case no corruption is charged upon the grand juror, or upon the officers who made statements to him. The most that can be said, is that there was an excess of zeal. It is always considered that, in finding indictments, grand jurors may act upon their own knowledge, or upon the knowledge of one or more of their number. It is accordingly held in most jurisdictions that it is no objection to the validity of an indictment that one or more of the grand jurors, who was otherwise qualified had formed or expressed an opinion of the guilt of the accused (Tucker's Case, 8 Mass. 286; State v. Hamlin, 47 Conn. 95, 114; State v. Chairs, 9 Baxt. 196; Musick v. People, 40 Ill. 268; Lee v. Georgia, 69 Ga. 705; U. S. v. Williams, 1 Dill. 485); also that an interest or bias in the case, if not pecuniary, is not an objection (Com. v. Brown, 147 Mass. 585, 18 N. E. Rep. 587; State v. Brainerd, 56 Vt. 532; State v. Rickey, 10 N. J. Law, 83; Com. v. Strother, 1 Va. Cas. 186; State v. Easter, 30 Ohio St. 542; Koch v. State, 32 Ohio St. 353; State v. Maddox, 1 Lea, 671; *In re* Nowlan, 2 Jebb. & S. 1). It has also often been held or declared that the court will not inquire whether incompetent evidence was heard by the grand jury. Com. v. Knapp, 9 Pick. 495, 496; State v. Dayton, 23 N. J. Law, 49; State v. Fasset, 16 Conn. 457, 472; Hope v. People, 83 N. Y. 418; People v. Hulbut, 4 Denio, 133; Com. v. Carns, 2 Pa. Law J. 172; Stewart v. State, 24 Ind. 142; Creek v. State, *Id.* 151; State v. Tucker, 20 Iowa, 508; State v. Fowler, 52 Iowa, 103, 2 N. W. Rep. 983; State v. Boyd, 2 Hill (S. C.), 288; Bloomer v. State, 3 Sneed, 66; Reg. v. Russell, Car. & M. 247.

The indictment is merely an accusation or charge of crime. For the protection of the people against unreasonable accusations, there are constitutional and statutory provisions that, with certain exceptions, no person shall be held to answer for crime, unless upon indictment. Const. U. S. 5th Amend.; Pub. St. ch. 200, § 3. This means an indictment found in the usual course of proceedings. It is not, however, necessary that each grand juror shall be free from bias or prejudice, provided he has the general qualifications which are required. Such a test is not implied either from the terms of his oath or from the nature of his duties. If such an inquiry were open, the delays and complexity of criminal trials would be greatly increased, and no correspondingly useful purpose would be served.

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NEGLIGENCE—TRIAL—PRIMA FACIE CASE—NONSUIT.—In Dixon v. Pluns, decided by the Supreme Court of California, it appeared that, while plaintiff was walking on the sidewalk of a public street, an employee of defendant, who was repairing a building overhead, let fall a chisel, which struck plaintiff on the head inflicting a serious injury. It was held that this established a *prima facie* case of negligence on the part of defendant, and a nonsuit was properly denied. Garoutte, J., says:

The motion for a nonsuit was properly denied. Upon the evidence we cannot say that the respondent was guilty of contributory negligence in walking upon the sidewalk at the time the injury was inflicted. She had a right to be there, and had no sufficient reason to anticipate danger from overhead. Respondent's evidence also established a *prima facie* case of negligence upon the part of appellant. Conceding the rules of evidence as between master and servant to be as intimated in Madden v. Steamship Co., 86 Cal. 448, 25 Pac. Rep. 5, still that case is not this case. Respondent was walking upon a public thoroughfare. An employee of appellant, while engaged in repairing a building overhead, let fall a chisel, which inflicted the injury. Those facts constitute a *prima facie* ca s

for the presumption of negligence upon the part of the employee flows therefrom, and authorities are ample to support this principle of law. As to common carriers this doctrine is fully discussed and adopted in the case of Boyce v. Stage Co., 25 Cal. 460, where Chief Justice Sanderson said: "The argument places the burden of explanation upon the shoulders of the plaintiff, but, unfortunately for the argument, the law places it upon the shoulders of the defendant." This case was approved in Treadwell v. Whittier, 80 Cal. 583, 22 Pac. Rep. 266, a case of injury by the falling of an elevator; the court holding that the rule applied to common carriers was equally applicable to the owner of an elevator. It is there said: "In this case the plaintiff was only called on to show that he was hurt by the breaking of the machinery of the elevator, by which he was injured. When this is done, he has made out a case on which, there being no other evidence introduced, he has a right to recover." The application of the principle of presumption of negligence from the facts and circumstances of the accident apply to the present case as entirely and fully as to the preceding citations. No sound reason can be advanced to the contrary. Upon principle there is no distinction. This question is carefully considered, and the authorities reviewed, in Mullen v. St. John, 57 N. Y. 567. In that case the wall of a building fell upon a traveler in the street. The court held that a presumption of negligence arose from the fact of the building falling. In Lyons v. Rosenthal, 11 Hun, 46, the injury arose from the falling of a box of goods from the story above, and it was held that negligence would be presumed. In support of this doctrine the court cited various English authorities, which upon their facts stand upon common ground with the case at bar. See Kearney v. Railroad Co., L. R. 5 Q. B. 411; Byrne v. Boadle, 2 Hurl. & C. 722; Scott v. Dock Co., 3 Hurl. & C. 596. The true rule recognized by the authorities as pertaining to this class of accidents is: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Shear. & R. Neg. § 60.

Harrison, J., while concurring in the holding that the court properly refused a nonsuit, upon the ground that when the plaintiff rested her case she had presented sufficient evidence to establish a *prima facie* case, refused to concur in that portion of the opinion which holds that the liability of the defendant is to be determined by the same rules which determine the liabili y of common carriers of passengers. In his opinion "their relation to a passenger is such that, upon the proof of an injury sustained by him while being carried, negligence is presumed, and the burden of exonerating itself from liability is thrown upon the carrier. Bush v. Barnett (Cal.), 31 Pac. Rep. 2. In the present case, however, there was no contractual relation between the plaintiff and the defendant, and as the liability of the defendant is predicated solely upon his negligence, it was essential for the plaintiff to present some evidence tending to establish such negligence before she was entitled to recover. Whart. Neg. § 421. "It is believed that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to the plaintiff, without more, will amount to evidence of negligence on the part of the defendant." Thomp. Neg. p. 1227. See, also, Cosulich v. Oil Co., 122 N. Y. 123, 25 N. E. Rep. 259; Huff v. Austin, 46 Ohio St. 386, 21 N. E. Rep. 864.

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WAGERS—VALIDITY—RECOVERY OF MONEY BET.—Bernhard v. Taylor, 31 Pac. Rep. 968, decided by the Supreme Court of Oregon, is a novel case on the subject of wagers. It is held that wagers are void and that when a man wagers money on a foot race, knowing that it is to be a bogus race, and intending thereby to defraud others of their money, he may recover the money, if, before the race is run, he repents, and demands his money of the stakeholder, since to allow him to recover does not aid or affirm an illegal contract, but arrests it, and puts the parties in the same position they occupied before the contract was made. Lord, C. J., says:

The first contention for the defendant is that wagers or wagering contracts upon indifferent subjects are valid in this State, by force of the common law, except when prohibited by statute. There can be no doubt that wager contracts upon indifferent matters were valid at common law. Good v. Elliott, 3 Term R. 693; Jones v. Randall, 1 Cowp. 37; De Costa v. Jones, 2 Cowp. 734; Bunn v. Riker, 4 Johns. 426. But all wagers which tended to a breach of the peace, or to injure the feelings, character, or interests of third persons, or which were against the principles of morality or of sound policy, were void at common law. 4 Kent, Comm. 466; Greenh. Pub. Pol. 226. And all wagers in contravention of the positive provisions of any statute are also void. Of late years, by legislation and judicial decision, the hostility to wagers of every nature has been marked. This is doubtless due to the increase of betting, and the civil consequences resulting therefrom. As O'Neall, J., said: "Every bet tends directly to beget a desire of possessing another's money or property without an equivalent. Men acted upon by such influences easily become gamblers, and then the road to every other vice is broad and plain." Rice v. Gist, 1 Strob. 84. And the tendency of judicial opinion in repudiating all kinds of wagers is well illustrated in Love v. Harvey, 114 Mass. 82, wherein Gray, C. J., says: "It is inconsistent with the policy of our laws, and with the performance of duties for which courts of justice are established, that judges and juries should be occupied with every frivolous question upon which idle or foolish persons may choose to lay a wager." Equally emphatic is Belford, J., in Eldred v. Malloy, 2 Colo. 321, wherein he says: "If we enter upon the work of settling bets made by gamblers in one case, . . . we may de-

spair of ever finding time for the dispatch of those weightier matters which affect the person and property rights of the respectable people in this territory. If the gate is once opened for this kind of litigation, it is more than probable we may be overrun with questions arising out of bets. The spirit of our laws discountenances gambling." Wagers are inconsistent with the established interests of society, and in conflict with the morals of the age; and, as such, they are void, as against public policy. In view of these considerations, we do not think that such transactions, though upon indifferent subjects, are valid in this State.

The next contention for the defendant is that the alleged agreement was corrupt, illegal, and criminal, in this: that it was in advance "fixed" that one of the parties should win, and that certain persons should lose their money. In other words, that the agreement had in contemplation "a job race." This, it is claimed, put the plaintiff *in pari delicto* with the defendant, and, as a consequence, he is entitled to the benefit of the rule, *potior est conditioni possedentis*. The general rule is that the law will not interfere in favor of either party *in pari delicto*, but will leave them in the condition in which they are found, from motives of public policy. There is no doubt, where money has been paid on an illegal contract, which has been executed, and both parties are *in pari delicto*, the courts will not compel the return of the money so paid. But the cases show that an important distinction is made between executory and executed illegal contracts. While the contract is executory, the law will neither enforce it nor award damages; but, if it is already executed, nothing paid or delivered can be recovered back. So that, while the contract is executory, the party paying the money or putting up the property may rescind the contract and recover back his money. This arises out of a distinction between an action in affirmance of an illegal contract and one in disaffirmance of it. In the former, such an action cannot be maintained, but in the latter an action may be maintained for money had and received. The reason is that the plaintiff's claim is not to enforce, but to repudiate, an illegal agreement. Whart. Cont. § 354. In such case, there is a *locus penitentiæ*. The wrong is not consummated, and the contract may be rescinded by either party. In Edgar v. Fowler, 3 East, 225, Lord Ellenborough said: "In illegal transactions, the money has always been stopped while it is *in transitu*, to the person entitled to receive it." As Lord Justice Mellish said: "To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps. If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action. The law will not allow that to be done." Taylor v. Bowers, 1 Q. B. Div. 291. In Hastelow v. Jackson, 8 Barn. & C. 221, which was an action by one of the parties to a wager on the event of a boxing match, commenced against the stakeholder after the battle had been fought, Littledale, J., said: "If two persons enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards." Smith v. Bickmore, 4 Taunt. 474; Tappenden v. Randall, 2 Bos. & P. 467; Lowry v. Bourdieu, 2 Doug. 452: Munt v. Stokes, 4 Term R. 561; Insurance Co. v. Kip, 8 Cow. 20; Merritt v. Millard, * 43 N. Y. 208; White v. Bank, 22 Pick. 181; O'Bryan v. Fitzpatrick, 48 Ark. 490, 3 S. W. Rep. 527. "And this rule," says Mr. Justice Woods, "is applied in the great majority of the cases, even when the parties to an illegal contract are *in pari delicto*, because the question which of two parties is the more blamable is often difficult of solution, and quite immaterial." Spring Co. v. Knowlton, 103 U. S. 60. The object of the law is to protect the public, and not the parties. This is upon the principle that it best comports with public policy to arrest the illegal transaction before it is consummated. Stacy v. Foss, 19 Me. 335.

It only remains to apply these principles to the facts. These show that the plaintiff was cognizant that the race had been fixed in advance; that one of the parties should win, and that certain other persons should lose their money; that it was a bogus race, and the arrangement based upon it corrupt, and designed to cheat and defraud the other parties; but at the same time they show that he repented, and repudiated the transaction before it was consummated, by demanding the return of his money the evening of the day before the race, and on the day of the race, but before it was to come off, and that the defendant refused to pay it back, and that he afterwards forbade the defendant to pay said money to any other person than himself. He availed himself of the opportunity which the law affords a person to withdraw from the illegal contract before it has been executed. He repented before the meditated wrong was consummated, and twice demanded to withdraw his money, and thereby rescinded the contract. To allow the plaintiff to recover does not aid or carry out the corrupt and illegal transaction, but the effect is to put the parties in the same condition as they were before it was determined upon. By allowing the party to withdraw, the contemplated wrong is arrested, and not consummated. This the law encourages, and no obstacle should be thrown in the way of his repentance. Hence, if the plaintiff retreated before the bet had been decided, his money ought to have been returned to him; and, in default of this, he is entitled to recover.

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MUNICIPAL CORPORATIONS — DEFECTIVE STREETS.—In City of Joliet v. Shufelt, 32 N. E. Rep. 969, the Supreme Court of Illinois hold that a city which has negligently constructed a street is liable for damages received by a person who, without negligence on his part is thrown from a buggy on account of such defective construction, even though such accident would not have happened had not the harness broken and the horse run away. Shope, J., says:

It is insisted with great force that, conceding the negligence of the defendant, such negligence was not the proximate cause of the injury; and that, in any event, the running away of the horse concurring in producing the injury, the defendant is, therefore, not liable. We are referred to a number of Massachusetts cases, and some others may be found, which sustain the views of counsel. In this State, however, these cases have not been followed. In Joliet v. Verley, 35 Ill. 58, we held that if a plaintiff, while observing due care for his personal safety, was injured by the combined result of an accident and the negligence of a

city or village, and without such negligence the injury would not have occurred, the city or village will be held liable, although the accident be the primary cause of the injury, if the consequences could, with common prudence and sagacity, have been foreseen, and provided against. This doctrine has received express approval in many subsequent cases, among which may be mentioned Bloomington v. Bay, 42 Ill. 503; City of Lacon v. Page, 48 Ill. 499; Village of Carterville v. Cook, 129 Ill. 152, 22 N. E. Rep. 14. And in City of Lacon v. Page, *supra*, the doctrine was applied to a case like the present, where the accident concurring with negligence of the city in producing the injury was the running away of the plaintiff's horses without fault on his part. There the city, having constructed a drain under one of its streets, allowed it to so get out of repair that a hole a foot wide, two feet long, and eight inches deep had been made in the street. The plaintiff was driving his horses to a lumber wagon, when they ran away. One wheel of the wagon going into this hole, in the rebound plaintiff was violently thrown to the ground, and injured. We then said, after approving the rule in the Verley case, *supra*, and holding it applicable: "One great reason for requiring a corporation to keep its streets in repair is to reduce, as far as possible, the injuries that may result from the accidents so liable to occur in crowded thoroughfares. If the accident would not have caused the injury but for the defect in the street, and that defect is the result of carelessness on the part of the city, and the plaintiff has used ordinary care, the city must be held liable." The same doctrine has been announced in many decided cases elsewhere. See Ring v. City of Cohoes, 77 N. Y. 83; Baldwin v. Turnpike Co., 40 Conn. 238; Hull v. Kansas City, 54 Mo. 601; Hunt v. Town of Pownal, 9 Vt. 411; Winship v. Enfield, 42 N. H. 197; Hey v. Philadelphia, 81 Pa. St. 44; Sherwood v. City of Hamilton, 37 U. C. Q. B. 410; Palmer v. Andover, 2 Cush. 600; Kelsey v. Glover, 15 Vt. 708. In Baldwin v. Turnpike Co., *supra*, it is said: "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable. Nor will the fact that the horse of the plaintiff was uncontrollable for some distance before the injury occurred in any way affect the liability of the defendants." And the court held the loss should be charged upon the party guilty of the first and only negligence. In Ring v. City of Cohoes, *supra*, after reviewing the authorities upon this subject, it is said: "When, without any fault of the driver, a horse becomes uncontrollable, or runs away, it is regarded as an incidental occurrence, for which the driver is not responsible; and the rule, as laid down in the cases cited, may be formulated thus: When two causes combine to produce an injury upon a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect. This appears to us to be the reasonable rule." And, after noting the care and diligence required of municipalities, the court adds: "They are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads, and if they do not, and a traveler is injured by culpable defects in the roads, it is no defense that his horse was, at the time, running away, or was beyond his control."

We are aware that the courts of Massachusetts, Maine, Wisconsin, and perhaps other States, have adopted the contrary rule, but we are as already seen committed to the doctrine already announced; and independently of that, it seems to us to be the better and more reasonable rule. It imposes no additional duty or obligation upon the municipality, but requires only that it use reasonable skill and diligence in making its streets reasonably safe for travel, and to provide for such use of them as may reasonably be expected, and foreseen by the exercise of reasonable foresight and judgment. The general doctrine is that it is no defense, in actions for negligent injuries, that the negligence of third persons, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause, without which the injury would not have occurred. Railway Co. v. Shacklet, 105 Ill. 364; Transit Co. v. Same, 119 Ill. 232, 10 N. E. Rep. 896; Machine Co. v. Keifer, 134 Ill. 481, 25 N. E. Rep. 799; Car Co. v. Laack, 32 N. E. Rep. 285 (not yet officially reported); Peoria v. Simpson, 110 Ill. 301. See 16 Amer. & Eng. Enc. Law, 440-443, and notes; 2 Thomp. Neg. 1085. This being the general rule, we are unable to perceive in what way the intervention of the mere brute force or will of the horse at liberty without fault or negligence of the plaintiff, and for which neither party is responsible, can be different in its effects or consequences from the intervention of the act of a third person, or of an accident having a like effect provided the injury would not have occurred but for the negligence of the defendant. In such case, neither the running away of the horse nor the defects in the street are alone sufficient to produce the injury, but it is produced by the combination of both, and they become, therefore, in combination, the efficient and proximate cause. The casual relation is direct between the defective street, occasioned by the negligence or omission of duty by the defendant, and the injury to the plaintiff, and without any intervening efficient cause.

## STATE'S ABILITY TO COPYRIGHT JUDICIAL OPINIONS.

"Can a State take out a copyright on the judicial opinions of its justices, as published in the volumes of reports, or otherwise, so as to protect another in the right to the sole publication and sale of those opinions and volumes of reports?"

This question has never been passed upon by the Supreme Court of the United States. It was not involved, and was not decided, in the case of Banks v. Manchester,[1] the latest authority from that court upon the question. To be enabled to understand this question intelligently it is necessary to determine:

I. Upon what the right to a copyright rests.

II. For what purposes copyrights are granted; and

[1] New York City, 128 U. S. 244; bk. 32, L. Ed. 425.

III. Who are entitled to a copyright.

I.—*Upon what the Right to a Copyright Rests.*—Literary property in the products and inventions of the brain did not exist at common law,[2] at least not as it was brought to this country by our forefathers as a part of their heritage.[3] In England, the right of copyright did not exist beyond a question until after the passage of the statute of Anne,[4] since which time the literary property of an author in his productions can only be asserted under the statute.[5] As it exists in the United States the right of literary property in an author or his assignee is not a common-law right, but depends wholly on the provisions of the federal constitution[6] and the legislation of congress.[7] In section 8, of article 1, of the federal constitution[8] it is provided that congress shall have power "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. In pursuance of the power thereby vested, congress has provided[9] "that any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and the models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same."

II.—*For what Purposes Copyrights are Granted.*—Having ascertained that the right of copyright rests entirely upon the federal constitution and the legislation of congress, the next thing to be ascertained is "for what purposes a copyright is granted" and for this we must have recourse to the foundation upon which the right of copyright itself rests. From this we find that copyrights may be granted "to promote the progress of science and the useful arts."[10] This manifestly includes the volumes of reports of decision of cases in the court of final resort and the intermediate courts of the States, which may be said to embody the science of the laws of the commonwealth, and the art of administering those laws.

III. *Who are Entitled to a Copyright.*—It remains to ascertain who may procure a copyright upon these opinions or volumes of reports. The federal statute[11] regulating this matter provides that "any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book," etc., "and the executors, administrators or assigns of any such person shall upon complying with the provisions of this chapter, have the sole liberty of printing," etc. To entitle a State under this statute to take out a copyright on the decisions of its courts and the opinions of its judges, which constitutes the bound volumes of its reports, it must appear:

1. That the State is: (*a*) A citizen of the United States, or (*b*) a resident therein; and 2, that the State is: (*a*) the author, inventor, designer or proprietor of the book; or (*b*) the executor, administrator or assignee of the author, inventor, designer or proprietor.

1. *Is the State a "Citizen" of the United States or a Resident Thereof.*—A "citizen" has been defined to be "one who owes the government allegiance, service, and money by way of taxation, and to whom the government, in turn, grants and guaranties liberty of person and of conscience; the right of acquiring and possessing property; of marriage and the social relations; of suit and defense, and security in person, estate, and reputation. These, with some others which might be enumerated, being guaranteed and secured by government, constitute a citizen. To aliens we extend these privileges by courtesy; to others we secure them—to male as well as females—to the infant as well as the person of hoary hairs."[12] Chief Justice Waite, in

[2] See Miller v. Taylor, 4 Burr. 2303; University of Cambridge v. Pryer, 16 East, 319.

[3] Wheaton v. Peters, 33 U. S. (8 Pet.) 591, 659, bk. 8, L. Ed. 1055.

[4] 8 Anne. ch. 19.

[5] See Wheaton v. Peters, 33 U. S. (8 Pet.) 591, 659. bk. 8, L. Ed. 1055.

[6] Art. 1, § 8.

[7] Banks v. Manchester, 128 U. S. 244, bk. 32, L. Ed. 425; Wheaton v. Peters, 33 U. S. (8 Pet.) 591, bk. 8, L. Ed. 1055; Myers v. Callaghan, 5 Fed. Rep. 726.

[8] U. S. Rev. Stat. (Ed. 1878), p. 20.

[9] U. S. Rev. Stat. (Ed. 1878), p. 957, § 4952.

[10] Federal Const. art. 1, § 8.

[11] U. S. Rev. Stat. (Ed. 1878), p. 957, § 4952.

[12] Amy v. Smith, 1 Litt. (Ky.) 332; approved in Van Valkenburg v. Brown, 43 Cal. 51, 13 Am. Rep. 136, 141.

delivering the opinion of the court in the case of United States v. Cruikshank,[13] says that "citizens are the members of the political community, to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights." The word "citizen" is analogous to "subject," "resident," or "inhabitant," at common law,[14] and the words "citizen" and "people of the United States" were declared to be synonymous terms in the Dred Scott case.[15] The Supreme Court of the United States say, in Minor v. Happersett,[16] that "there cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Every one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterward adopted in the articles of confederation, and in the constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more." The same court say in a late case that "citizens are members of the political community to which they belong. They are the people who compose the community, and who in their associated capacity have established or submitted themselves to the dominion of a government, for the promotion of their general welfare and the protection of their individual, as well as their collective rights."[17] Is the State such a citizen? We think not.[18] The term "citizen" applies only to natural persons, members of the body-politic,[19] and not to the body-politic itself. The State is but an integral part of that body-politic, the federal government. It is said by the Supreme Court of Georgia, in the case of White v. Clements,[20] that "the word 'citizens' is not used of the subjects of a monarchial government. The term involves an idea not enjoyed by subjects,—the inherent right to partake in the government. The republics of the old world were cities, and the word citizen was usually applied to inhabitants of cities. The people of modern republics have been called citizens, for the simple and obvious reason that their relation to the State was like the relation of citizens to the city. They were a part of its sovereignty,—they were entitled to its privileges, its rights, immunities, and franchises." It has been held by the Supreme Court of the United States that the word "citizen." as used in the constitutional protection of immunities of citizens of the several States, does not include corporations,[21] and by parity of reasoning a State is not such a "citizen" as is referred to and embraced within the provisions of section 4952, of the federal statute. If there was any doubt upon this question it seems to the writer that the remarks of the Justice Blatchford, in the case of Banks v. Manchester,[22] would set it forever at rest. He says: "The State cannot properly be called a citizen of the United States or a resident therein, nor could it ever be in a condition to fall within the description of §§ 4952 and 4954" of the federal statutes.

2. *Is the State the "Author" or "Proprietor" of its Reports?*—It will not be contended by anyone that the State is directly the author of any decision or report of its courts. The

[13] 92 U. S. (2 Otto) 542, bk. 23, L. Ed. 588.

[14] See United States v. Rhodes, 1 Abb. (U. S.) 39; Morris v. Nashville, 6 Lea (Tenn.), 337; Morse on Citizenship, 303, and cases cited.

[15] Scott v. Sanford, 60 U. S. (19 How.) 393, bk. 15, L. Ed. 691.

[16] 88 U. S. (21 Wall.) 162, bk. 22, L. Ed. 627.

[17] United States v. Cruikshank, 92 U. S. (2 Otto) 542, bk. 23, L. Ed. 588.

[18] 2 Story's Constitution, §§ 1692, 1932.

[19] United States v. Cruikshank, 92 U. S. (2 Otto) 542, 549, 550; Paul v. Virginia, 75 U. S. (8 Wall.) 168, bk. 18, L. Ed. 357.

[20] 39 Ga. 232, 260.

[21] Liverpool & London L. & F. Ins. Co. v. Oliver, 77 U. S. (10 Wall.) 566; bk. 12, L. Ed. 1029; Paul v. Virginia, 75 U. S. (8 Wall.) 168; bk. 19, L. Ed. 357. See also Ducat v. Chicago, 48 Ill. 172.

[22] 128 U. S. 244, 253-4, bk. 32, L. Ed. 425, 429.

State, as an organization, is an incorporeal creature, and acts only through its accredited agents. The various judges of the court of last resort and intermediate courts are its agents to expound the laws, interpret the statutes, and decide disputed questions of rights and obligations between various persons who are citizens of, or entitled to the protection of the State. The judges of the various courts are the paid officers of the State, that is, of the people. Each individual who constitutes a portion of the commonwealth has a personal interest and property in each decision made, and each opinion written by each and every judge of the State, no matter over what court he presides. The judge who gives a decision, or writes an opinion, being the servant of the people of the whole State and of each individual citizen or inhabitant thereof, and paid for his services out of the public treasury, in making such decision or rendering such opinion acts in his official capacity, and can in no proper sense be said to be the "author, inventor or proprietor" thereof, or at least not in the sense implied by section 4952, of the United States Revised Statutes, so as to enable him to take out a copyright thereon himself, or to be able, by assignment, to confer that right upon the State or another under that section, as the assignee of the "author" or "proprietor."[23] The Supreme Judicial Court of Massachusetts say, in the case of Nash v. Lathrop,[24] that "the decisions and opinions of the justices are the authorized expositions and interpretations of the laws which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statute enacted by the legislature." And this opinion is cited with approval in the case of Banks v. Manchester.[25] The decisions of causes, while rendered particularly for the contending parties, are read and announced for the information and benefit of the people of the State at large, and of each citizen or inhabitant thereof; and this reading or announcement, it is submitted, is such a "publishing" as would defeat a right to copyright on the part of the State, if one ever existed, because as soon as read or announced these decisions or opinions become the property of the whole State, and of each individual or citizen thereof. While Justice Blatchford says, in the case of Banks v. Manchester,[26] that the question "whether the State could take out a copyright for itself, or could enjoy the benefit of one taken out by an individual for it, as the assignee of a citizen of the United States or a resident therein, who should be the author of a book is one not involved in the present case, and we refrain from considering it;" yet it is thought, that this decision really determines the inability of a State to take out a copyright, because it distinctly declares that "the State cannot properly be called a citizen of the United States or a resident therein, nor could it ever be in a condition to fall within the description in section 4952 or section 4954" of the Revised Statutes, the sections which provide for the taking out of copyrights and of renewals thereof.

3. *Can a State take as the "Assignee" of the Reporter?*—If the State cannot take out a copyright for itself in the first instance, it cannot take out one at all unless it be as the assignee of the author or proprietor of the reports. In many of the States there are statutes providing that the reporter of the decisions of the State courts shall copyright the volumes of these reports in the interest of, and for the benefit of, the State, but such provision of the State law cannot, in any manner, enlarge the reporter's property rights under the federal statutes. Neither the State, of which he is the servant, nor the court or the judges, whose opinions and decisions he reports, can confer upon the reporter any interest in the opinions of the judges, the decisions of the court, or the bound volumes of the reports, other than those already secured by the federal statute,[27] and what the judges and court cannot confer

[23] See Banks v. Manchester, 128 U. S. 244, bk. 32, L. Ed. 425.

[24] 142 Mass. 29, 35.

[25] *Supra.*

[26] 128 U. S. 244.

[27] Wheaton v. Peters, 33 U. S. (8 Pet.) 668, bk. 8, L. Ed. 1055.

on the reporter as the basis of a copyright in him, they cannot confer on the State.[28] Since, as we have seen, neither the judges nor the reporter can be said to be either the "author" or "proprietor" of the opinions of the court within the meaning of the federal statute, it follows that the State cannot copyright for itself, and cannot hold as the assignee of the reporter, the written opinions of the judges of its courts. The only thing that the State can copyright, if it can copyright anything at all, which is very seriously questioned, or which it can hold as the assignee of another, is the work done by the reporter himself; that is to say, the syllabi to the cases, where the reporter writes them; the statement of the cases and the synopsis of the arguments of counsel, where the reporter prepares them, and the table of cases reported and cited, the index, and the arrangement of the cases as made by the reporter. But if, as Justice Blatchford says, in the case of Banks v. Manchester,[29] the State cannot "ever be in a condition to fall within the description of section 4952 or section 4954" of the United States Revised Statutes, it can never be in a condition to take out a copyright itself upon any work, or to take as the assignee of the author or proprietor of any book or volume of reports.

JAMES M. KERR.

[28] Banks v. Manchester, 128 U. S. 244, 254, bk. 32, L. Ed. 425, 429.

[29] *Supra.*

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NEGOTIABLE INSTRUMENT—NOTE BY PRESIDENT OF CORPORATION—PERSONAL LIABILITY.

MATTHEWS V. DUBUQUE MATTRESS CO.

*Supreme Court of Iowa, January 24, 1893.*

Where a note reads, "We promise to pay," etc., and is signed, "D. M. Co., J. K., President," the note binds the president personally; parol evidence being inadmissible to show that the company was the only promissor, and that the payee knew this fact when taking it. Kinne and Granger JJ., dissenting.

ROTHROCK, J.: The note upon which the action was brought was in these words: "$290.87. Chicago, Ill., March 15th, 1889. Ninety days after date, we promise to pay to the order of J. T. Matthews & Co. two hundred and ninety and eighty-seven one hundred dollars. Payable at the office of the Dubuque Mattress Co., Dubuque, Iowa. Value received. Accepted March 21, 1889. Dubuque Mattress Co. John Kapp, Pt." Defendant Kapp alone answered,—that at the date and acceptance of the note he was the president of the corporation, the Dubuque Mattress Company, and had full authority to sign notes and acceptances for said corporation in its business; that the consideration for the note sued on was goods purchased from the plaintiff firm for the mattress company, and that the mattress company received the whole of the consideration for the note, which fact was known to the plaintiff; that the plaintiff knew when taking the note that it was signed by appellant only to evidence the signature and bind the corporation, and that the appellant so intended. A demurrer to the answer was sustained, from which ruling this appeal is taken.

The only question in the case is as to the admissibility of parol evidence to establish the facts set forth in the answer. This court has held in a large number of cases that where the person signing a note adds thereto his name of office, either in full or by abbreviation, and there is nothing on the face of the instrument showing that he does not intend to be bound thereby, he is personally liable for the performance of the contract, because the name of office is merely descriptive of the person. We need not cite the cases. They will be found in McClain's Digest (volume 1) under the title of "Agency." The latest expression of this court upon that subject will be found in the recent case of Lee v. Percival, 52 N. W. Rep. 543. And this rule has the sanction of a large preponderance of adjudged cases. In Parsons on Contracts (volume 1, p. 57) it is said, in reference to that question, that "the case sometimes occurs where a person holding some office signs his name, adding to it the name of his office, for the purpose of representing himself as an official agent, and preventing his personal liability; but this mere addition seldom has this effect, being usually regarded only as a word of description." This rule is based upon the principle that the legal effect of the language used in the note or contract imports an obligation personally binding upon the signer of the instrument. And in the cases of Heffner v. Brownell, 75 Iowa, 341, 39 N. W. Rep. 640, and McCandless v. Canning Co., 78 Iowa, 161, 42 N. W. Rep. 635, we held that parol evidence was not admissible to show that a party signing a note in that way did not intend to be personally liable thereon. These cases are decisive of the question presented in the case at bar, and must lead to an affirmance, unless we overrule decided cases. A majority of the court are not able to discover any good reason for so doing. An examination of adjudged cases will show, as claimed by counsel for appellant, that there is authority for holding that extrinsic evidence is admissible to explain the writing. On the other hand, there are many cases which hold that parol evidence is not admissible. An able text writer uses the following language in reference to this question: "To extract general principles from these cases whose conflict is so great as to amount, in the language of a recent case, 'almost to anarchy,' is manifestly difficult." We do not deem

it necessary to cite the cases which are in accord with the former rulings of this court. When it is conceded that the instrument construed alone is binding on the party, it appears to us that there is no law pertaining to ambiguous writings which will authorize a relaxation of the rule that a written contract cannot be added to, altered or changed by parol evidence; and the rule as recently announced by this court in Lee v. Percival, *supra*, renders it wholly unnecessary, to the protection of any right of the signer of such an instrument, to overrule any case heretofore decided by this court. The note involved in Percival's Case is substantially the same as the note in the case at bar; and it is held that the party whose name was signed might by an appropriate pleading set up that the note was so signed by mutual mistake of the party, and demand a reformation of the instrument and prove the mistake by parol. It should be the aim of every court of last resort to build up a harmonious and consistent line of authority, and thus avoid confusion; and the cases should be overruled only when there appears to be a necessity therefor, in order to protect the rights of the people, or to promote the proper administration of justice. When a party to such an instrument is by an authoritative decision of this court given the opportunity to reform the instrument by parol evidence, he should not be heard when he asserts the claim that former decisions of the court should be overruled, because there are cases in conflict with them, and because he cannot be allowed to introduce parol evidence in an action at law, and under a merely defensive answer.

It is claimed that because this note is made payable at the office of the Dubuque Mattress Company, and that the note contains the words, "Accepted, March 21st. 1889," it renders the instrument ambiguous, so as to change the rule as to extrinsic evidence. We discover nothing in fixing the place of payment, or the use of the words of acceptance, to create any ambiguity which would affect the question as to the introduction of extrinsic evidence to contradict the legal effect of the instrument. The judgment of the district court is affirmed.

NOTE.—The cases upon the subject of the principal case seem to be in irreconcilable conflict, growing principally out of the many phases which the facts of the many different cases assume. Two of the judges of the Iowa court, it will be observed, dissent from the conclusion of the court, and the dissenting opinion of Kinne, J., contains an interesting review of authorities supporting their contention. It seems to be generally agreed that where there is anything on the face of the paper, whether in the body of the note or as a part of the signature, which suggests a doubt as to the party bound or the character in which any of the signers has acted in affixing his name, parol evidence is admissible between the original parties to establish the real intent. Hence, while where one signs as agent of another, the *prima facie* presumption is that the words are merely *descriptio personæ* and therefore one so signing is personally bound, yet it may be shown in an action between the original parties to the instrument, that it was not so intended, and that in fact the real intention was to bind the principal whose name was disclosed in the signature of his agent, or who was well known by the payee to be the real party to be bound. Hardy v. Pilcher, 57 Miss. 18; Haile v. Peirce, 32 Md. 327; McClellen v. Reynolds, 49 Mo. 312; Baldwin v. Bank, 1 Wall. 234; Carpenter v. Farnsworth. 106 Miss. 561; Means v. Swormstedt, 32 Ind. 87.

Mechem on Agency, Sec. 443, thus states the rule as being supported by the preponderance of authority: "Between the immediate parties to a bill or note, parol evidence is admissible to show that by a course of dealing between the parties that form of execution has become to be the recognized and adopted form by which the obligation of the principal is entered into;" and that it is admissible to show "that the instrument was to the knowledge of the parties intended to be the obligation of the principal and not of the agent, and that it was given and accepted as such." Metcalf v. Williams, 104 U. S. 93; Hovey v. Magill, 2 Conn. 680; Gerber v. Stuart, 1 Mont. 172; Bank of Gennesee v. Patchin Bank, 19 N. Y. 312.

A good many cases can be found which support the doctrine of the majority of the court in the principal case, but the weight of authority seems to us to be opposed. See Martin v. Smith (Miss.), 3 South. Rep. 33, where a bill of exchange was drawn in the ordinary form but signed by one with the word treasurer following his name. It was held parol evidence was admissible to show that it was intended to bind the principal. See to same effect, Rowell v. Oleson, 32 Minn. 288. In Bean v. Mining Co. (Cal.), 6 Pac. Rep. 86, where a note in the ordinary form and signed "Pioneer Mining Company, John E. Mason, Supt.," the note reading "we promise to pay," parol evidence was admitted to show that the intention was to bind the company only. In a case where a notein the usual form was signed "W. D. Boutell, Pres.," it was held that the *prima facie* character of the liability might be overcome by parol evidence and the obligation shown to be that of the corporation. Collender Co. v. Boutell, 45 Minn. 21. In Bank v. Boardman (Minn.), 48 N. W. Rep. 1116, a note in the usual form was payable to A. J. Boardman, treasurer, and signed "Minneapolis Eng. & Mach. Works, by A. L. Crocker, Sec." and was indorsed "A. J. Boardman, Treas." It was held parol evidence was admissible to show that Boardman indorsed it in his official capacity as treasurer of the corporation. In Kean v. Davis, 21 N. J. L. 683, a bill of exchange was signed "John Kean, Pres. Elizabethtown & Somerville Railroad Co." It was held that parol proof was admissible to show that the bill was the bill of the company and not of the defendant individually, and that although where a written instrument is not ambiguous or uncertain on its face, parol proof cannot be resorted to to show what was the real intention of the parties, yet that in cases of ambiguity it might be introduced to explain which of two doubtful constructions was the intent of the parties. In Haile v. Peirce, 32 Md. 327, where a note was drawn "we the president and directors" of a company and was signed by them with the official title after each name, it was held that parol evidence was admissible to show that the note was given and received as the note of the company. In Means v. Swormstedt, 32 Ind. 87, the secretary of an incorporated company gave a promissory note under the seal of the company, using the words "we promise to pay," etc., and signed his own name with "Sec." affixed, it was held that he was not personally liable thereon. In Metcalf v. Williams, 104 U. S. 93, checks were drawn by ——as vice president and ——as

secretary of a certain corporation. It was held the check of the corporation and that where a person acts merely as agent for another and as such signs papers, an express disclosure of his principal's name on their face or in the signature is not essential to protect him from personal liability to a party having full knowledge of the facts.

It is said in the dissenting opinion that cases may be found which go so far as to hold that a note in form like that at bar, is on its face ambiguous and the obligation of the corporation alone. Citing Bank v. Colby, 64 Cal. 352; Liebscher v. Kraus, 74 Wis. 387; Draper v. Heating Co., 5 Allen, 338; Castle v. Foundry Co., 72 Me. 167; Houghton v. Bank, 26 Wis, 663; Latham v. Flour Mills (Tex.), 3 S. W. Rep. 462. The dissenting judges claim that the admission of parol evidence in such cases as this one does not violate the general rule prohibiting its admission to alter or change a written contract. The question in such cases is not what the contract is, but whose contract is it? On whose behalf was it executed? Who is the real party bound thereby? Such evidence renders that certain which without it is uncertain, and thus enables the court to charge as obligor or payor, the person or corporation which it was intended should be bound when the contract was entered into. The dissenting judges conclude as follows: "If John Kapp had added the word 'by' or 'per' to the signature of the 'Dubuque Mattress Company,' and followed it with his own name, he would have unquestionably bound the company only. By signing, as he did, with 'Pt.' after his name, the question is at once suggested, did he or did he not sign this note in an official capacity. To determine this fact, extrinsic evidence may be resorted to. The doctrine announced in the majority opinion seems to be based on the prior holdings of this court, and special stress is given to the fact that in Lee v. Percival (Iowa), 52 N. W. Rep. 543, the court has furnished a means of escape from the effect of the rule, which is purely technical, by means of reformation of the instrument in equity. No reason is suggested why a party should be driven to a court of equity except to avoid the necessity of overruling bad precedents. The rule announced in the cases cited in the majority opinion is not a rule of property, and, as I believe, contrary to the trend of modern decisions, is well calculated to effectuate injustice; and is indefensible from any point of view."

## CORRESPONDENCE.

### IMPLIED WARRANTY IN MANUFACTURERS' CONTRACTS OF SALE.

*To the Editor of the Central Law Journal:*

I have been interested by the leading article in your issue of March 10th, entitled "Implied Warranty in Manufacturers' Executory Contracts of Sale." I would suggest that you call the attention of the author of that article to the case of Potomac Steamboat Company v. Harlan & Hollingsworth Company, reported in 66 Md. p. 42, and particularly at page 51. In that case a steamboat was built by the Harlan & Hollingsworth Company, of Wilmington, Del., for the Potomac Steamboat Company of Baltimore, and the contract expressly provided that "machinery throughout should be of the best material, and the workmanship first-class." The undisputed fact was, that there was a very bad flaw in a part of the walking beam of the steamboat, and that the walking beam broke at that point. The question of whether a piece of material which contained such a flaw could in any way be regarded as fulfilling the requirements of such a contract, was much discussed in the case, and on page 51 of the report, the instructions of the court on that point will be found interesting.

The substance of that instruction was that, even if such a flaw did exist, if its locality and character were such that it could not have been detected, or prevented by the use of better material or workmanship, the contract was not violated. It occurred to me that the writer of the article which I have mentioned might find it profitable to look into this decision, and possibly make it the subject of another article, especially as the case of Hoe v. Sanborn was much discussed in that case.

W. L. MARBURY.

## BOOK REVIEWS.

### RAPALJE ON LARCENY.

The purpose for which this book was written, as we are informed by the author, is to furnish to those members of the profession who have to do with criminal causes an accurate and exhaustive presentation, in as concise a form as practicable, of all that has been decided in the adjudications of the courts of this country upon the constituent elements, prosecution, defense and punishment of that large class of crimes against property which are committed *lucri causa;* such as larceny, burglary, embezzlement, false pretenses, receiving stolen goods, robbery, and several other minor offenses, more or less of kin thereto.

It will thus be seen that the scope of the work is really broader than its title would indicate.

While it is true that existing treatises on criminal law touch upon all these specific crimes, it is also true that they cover none of them with thoroughness. They lay down the general rules applicable to them, but do not disclose a tithe of the multitude of applications of those principles which the courts have made.

Hence a work of this kind to the practitioner who desires to go to the bed rock of the subject is of timely value.

The author is well and favorably known, having written many useful text books; his experience for many years as editor of the *Criminal Law Magazine* gives him special qualifications for the presentation of subjects of this character.

We are very much impressed with the manner in which the book has been prepared. It exhibits throughout care, accuracy and great diligence. The text is clear and concise, and an almost endless citation of authorities appears in the notes. We also commend the beautiful typographical appearance of the book. It has about eight hundred pages, and is published by The Wait Publishing Co., Chicago.

### JONES' FORMS IN CONVEYANCING.

The fact that this book has had three editions within a period of six years is strong evidence of its merit. The present edition contains more than four hundred forms, over two hundred having been added in this edition. The author is well known as a law writer of eminence and his reputation is such that confidence may be had in the accuracy and reliability of the forms which he has collected. The forms are of acknowledgments, agreements, appointments, apprenticeships, arbitration, assignment, powers of attorney, bills of sale, bonds, building con-

tracts, deeds, guaranty, leases, mortgages, notices, partnership, party-wall agreements, pledges, protests, releases, settlements, trade-marks and wills. The book contains nearly a thousand pages, has a good index and is beautifully printed and bound. Published by Houghton, Mifflin & Co. Boston and New York.

## HUMORS OF THE LAW.

Justice Flynn—"What's the charge, officer?" P. C. O'Rourke—"Breaking the Sunday law, yer Anner." Justice—"How's that? O'Rourke—"Sure he wuz tryin' to get into Cassidy's saloon by de front dure instead of the family entrance."

When Benjamin F. Butler was a young practitioner Chief Justice Shaw of the Supreme Court of Massachusetts frequently felt obliged to call him to order. Gradually a little feeling grew up between the two men. One morning General Butler was seen on the train between Lowell and Boston, accompanied by a ferocious-looking bull dog. Somebody asked him where he was taking the animal. "To Boston," he said, laconically. "What are you going to do with him there?" "O," he said carelessly, "I'll give him to Judge Shaw to have a companion when he growls."

The following true incident occurred in Marshall County, Indiana:

A portly and pompous justice of the peace of Marshall County, erstwhile village blacksmith, undertook to reconcile the domestic difficulties between a man and his wife who had separated, gone together, and again separated. To do this he wrote a ponderous document setting forth that they had quarrelled and abused each other, but now they were "to forgive and forget" the past, and strive to live in peace. In conclusion this descendant of Vulcan said: "And the parties thereto do solemnly pledge themselves to keep this agreement in the presence of Almighty God and David Hull."

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**



1. ADMINISTRATION — Sale — Report. — The fact that the report of an administrator's sale may be insufficient to authorize the granting of an order to make title is no ground for excluding it as evidence of the facts recited.—WEBB V. BALLARD, Ala., 12 South. Rep. 106.

2. ADMINISTRATON—Sale of Decedent's Land—Infants. —Code, § 2114, provides that no order for the sale of a decedent's land for the payment of debts must be made where there are minors interested in the estate, "unless the probate court has taken evidence as in chancery proceedings, showing the necessity of such sale:" Held that, where the record of the probate court shows that only one witness was examined as to the necessity for a sale of the decedent's land to pay his debts, the order to sell, and the sale and conveyance thereunder, are void.—THOMPSON V. BOSWELL, Ala., 12 South. Rep. 85.

3. ADVERSE POSSESSION BY VENDOR.—The mere continued possession by a vendor of a portion of the land sold is not, when unaccompanied by any further assertion of claim, adverse. — CONNOR V. BELL, Penn., 25 Atl. Rep. 802.

4. APPEAL — Dismissal. — As a general rule, the dismissal of an appeal to the supreme court operates as an affirmance of the judgment of the trial court; and this rule applies to judgments against sureties on appeal undertakings under the act of 1885, subject to the statutory proviso. — SHANNON V. DODGE, Colo., 32 Pac. Rep. 61.

5. APPEAL—Presumptions. — Where, on the trial of a cause, exception to a charge is taken, immediately after it is given, on the ground that it is insufficient and misleading, by reason of certain words used therein, and such exception is allowed, the presumption is conclusive that the words excepted to were used. — IN RE ROSNER, Wash., 32 Pac. Rep. 106.

6. APPEAL FROM JUSTICE — Counterclaim. — Rev. St. art. 316, prohibiting any set-off or counterclaim from being set up in the county court which was not pleaded in the justice's court, in cases brought up by *certiorari*, applies also to cases brought up by appeal.—DOWNTAIN V. CONNELLEE, Tex., 21 S. W. Rep. 56.

7. APPLICATION OF PAYMENTS—Estoppel.—U, as principal, and W, as surety, executed bonds for the price of land purchased by U at judicial sale. Only part of these bonds was paid, and a judgment was recovered against U and W for the balance. The court then decreed a resale of the property, which brought less than the judgment. The payments made by U on the bonds, and the proceeds of the resale were applied on the overdue purchase money under the supervision of the court, and with the express assent of U: Held, in an action to enforce the judgment on land owned by W at the time of its entry, purchasers from W, with knowledge of the judgment, could not claim that there was a misapplication of the payments made by U and of the proceeds of the resale. — WELLS V. HUGHES' EX'R., Va., 16 S. E. Rep. 689.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS.—In an action involving the validity of a partnership assignment for the benefit of creditors, statements of an absconding partner of his purpose to make the assignment, and that he authorized his partner to execute it, are admissible as evidence.—BLUM V. BRATTON, Tex., 21 S. W. Rep. 65.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where an assignee for the benefit of creditors has accepted the trust, and is in possession of the debtor's property, the latter is in the custody of the law, and is not subject to attachment by a creditor on the ground that the assignment is fraudulent and void.—HAMILTON-BROWN SHOE CO. V. ADAMS, Wash., 32 Pac. Rep. 92.

10. ATTACHMEMT—Bill of Sale.—Where plaintiff, at the dissolution of an attachment, receives from the

attached debtor a bill of sale of the attached property, a good title vests in plaintiff, though the attaching officer had not made a delivey of the property to the attached debtor before the execution of the bill of sale. —ANDERSON V. LAND, Wash., 32 Pac. Rep. 107.

11. ATTACHMENT—Damages.—The value of real estate is not the measure of damages for wrongfully levying an attachment thereon; and, in reconvention for an attachment wrongfully levied on a stock of goods, the storehouse, and the lots on which it was situated, an instruction that the measure of damages is the market value of the goods and house and lots at the date they were attached is ground for reversal, even if it be conceded that the house is personal property.—BARKER V. ABBOTT, Tex., 21 S. W. Rep. 72.

12. ATTORNEYS — Negligence—Collections.—One who undertakes the collection of a claim is responsible for loss caused by the negligence of the attorney employed by him in the matter.—SINER V. STEARNE, Penn., 25 Atl. Rep. 826.

13. BANKS—Savings Banks—Taxation.—The fact that a corporation is engaged in a general banking business, in addition to a savings bank business, does not exempt that part of its business done as a savings bank from taxation under the laws applying to other savings banks.—MAIN ST. SAV. BANK & TRUST CO. V. HINTON, Cal., 32 Pac. Rep. 6.

14. BOUNDARIES—Unplatted Street.—Where a street extends up to an unplatted, unsurveyed tract of land, but has not yet been extended into such tract, and a lot is sold, and its boundaries fixed by such street, just as if it had been extended into the tract, and there is no doubt as to just where the street when extended would be, the fixing of it as a boundary will control the courses and distances of the conveyance.—POTTS V. CANTON COTTON COMPRESS & WAREHOUSE CO., Miss., 12 South. Rep. 147.

15. CARRIERS—Combinations to Maintain Rates.—An agreement between several competing railway companies, and the formation of an association thereunder, for the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the several lines, without preventing or illegally limiting competition, is not an agreement, combination, or conspiracy in restraint of trade in violation of the act of July 2, 1890, § 1.—UNITED STATES V. TRANS-MISSOURI FREIGHT ASS'N., U. S. C. C. (Kan.), 53 Fed. Rep. 440.

16. CARRIERS—Live Stock — Damages. — A shipper of cattle made a contract with a railroad company, which recited that, as a condition precedent to his right to recover damages for injury to cattle in transit, he should give notice of his claim therefor to some agent or officer of the company, or to its nearest station agent, within one day after delivery of the cattle at destination: Held that, where the cattle are to be delivered at a place where defendant alleges it had a station agent whom plaintiff knew and saw, whether the contract was unreasonable when it did not give the name of the agent or officer on whom notice is to be served was for the jury.—MISSOURI PAC. RY. CO. V. CHILDERS, Tex., 21 S. W. Rep. 76.

17. CARRIERS — Negligence — Dangerous Premises.— Where a railroad company, in having repairs made in a bridge leading from a highway to its station, and after the railing has been removed, leaves an open space unprotected by a railing, and uses the same in such condition for access to the station, it is liable for the death of a person falling through the opening while going to the station to buy a ticket. — GILMORE V. PHILADELPHIA & R. R. CO., Penn., 25 Atl. Rep. 774.

18. CARRIERS — Stock — Damages. — Where a carrier, after it has contracted to furnish cars at a certain time for the shipment of cattle, and after the shipper has commenced to load them, having them inspected as fast as they can be loaded, stops the loading, and gives the remaining cars to another shipper, who has already had his cattle inspected, it is liable to the first shipper for the damages caused by the delay, and is not relieved from liability by Crim. Code, art. 784, making it a misdemeanor for a railroad agent to receive for shipment cattle that have not been inspected; nor by Rev. St. arts. 4628,4630, 4651,requiring an inspection certificate and a bill of sale before the shipment of cattle. — RECEIVERS OF INTERNATIONAL & G. N. R. R. V. WRIGHT, Tex.,21 S. W. Rep. 56.

19. CARRIER OF PASSENGERS—Degree of Care.— The degree of care required of a railroad company towards its passengers is proportionate to the nature and risks of the business, and is such as would ordinarily be exercised by persons of great care and prudence under similar circumstances.— TEXAS & PAC. RY. CO. V. DAVIDSON, Tex., 21 S. W. Rep. 68.

20. CARRIERS OF PASSENGERS—Street Railroads—Negligence.—In an action for injuries alleged to have been caused while attempting to board a moving street car, the speed of which had been reduced in response to plaintiff's signal, and then, before plaintiff could get aboard, suddenly increased, it is not proper for defendant, the gist of the action not being an injury caused by fault of plaintiff, to interrogate witnesses as to whether the place was a safe one to board a moving car, or how they would have done under the circumstances had they wanted to board the car, although such questions are not materially prejudicial.—WOO DAN V. SEATTLE ELECTRIC RAILWAY & POWER CO., Wash., 32 Pac. Rep. 103.

21. CARRIERS OF PASSENGERS—Street Cars—Fares.— Private instructions by a street railway company to its drivers, to go through the cars when crowded and collect the fares, will not relieve it from liability for the ejection of a passenger, ignorant of such instructions, who, in obedience to a notice posted in the car prohibiting the driver from collecting fares, had deposited his fare in a box placed there for that purpose by the company, of which fact the driver had full knowledge when he demanded the fare a second time.—PERRY V. PITTSBURGH UNION PASS. RY. CO., Penn., 25 Atl. Rep. 772.

22. CHATTEL MORTGAGE—Distress for Rent.— Where property subject to a prior chattel mortgage is seized and sold under a distress warrant for rent, the mortgagee has no cause of action for the proceeds of such sale, his remedy being against the property in the hands of the purchasers, who take subject to the mortgage.—JACKSON V. MERCHANTS' HOTEL ASS'N, S. Car., 16 S. E. Rep. 713.

23. CONSTITUTIONAL LAW—City Ordinances.—A town ordinance directing the marshal to seize stock running at large in the streets, and to advertise and sell the same if not claimed, and charges paid, within 48 hours after the posting of a notice to that effect, does not violate Const. art. 1, § 3, declaring that no person shall be deprived of property "without due process of law." —WILSON V. BEYERS, Wash., 32 Pac. Rep. 90.

24. CONSTITUTIONAL LAW—Interstate Commerce Commission.—So much of the twelfth section of the interstate commerce act as assumes to authorize the circuit courts to make orders enforcing subpœnas issued by the interstate commerce commission is unconstitutional, since the constitutional grant of jurisdiction to the federal courts in "cases in law and equity" does not authorize those courts to use their powers merely in aid of an investigation before an administrative body.—IN RE INTERSTATE COMMERCE COMMISSION, U. S. C. C. (Ill.), 53 Fed. Rep. 476.

25. CONTRACT — Assumption of Mortgage. — A purchaser of land situated in Alabama executed his two notes or obligations for the deferred purchase money. The notes contained a condition, which after reciting the execution of a mortgage on the land, provided that in case of foreclosure the purchaser should be personally liable only for the proceeds of the sale, and that such proceeds should be a cancellation of the notes. The land was thereafter sold, and in the deed of conveyance the grantee covenanted to assume the

payment of the notes as part of the purchase price: Held, that an action in assumpsit for money had and received could be maintained against the grantee on the contract for the payment of the mortgage.—ORMAN V. NORTH ALABAMA DEVELOPMENT CO., U. S. C. C. (Ala.), 53 Fed. Rep. 469.

26. CONTRACTS — Future Delivery. — A contract for future delivery of certain quantities of steel slabs and billets in fixed installments at stipulated times, payment to be made after each delivery, is entire, and not separable.—CLARK V. WHEELING STEEL WORKS.—U. S. C. C. of App., 53 Fed. Rep. 494.

27. CONTRACT—Parol Evidence.—Where a written contract is not denied, and no fraud or mistake is alleged, a party cannot show by the uncorroborated testimony of a single witness, emphatically contradicted by the other party, or even uncontradicted, that the actual contract is different from the writing.—VAN VOORHIS V. REA, Pa., 25 Atl. Rep. 800.

28. CONTRACT—Revocation of Proposal.—If he who proposes should, before consent is given by the promisee, change his intention, the concurrence of the two wills is wanting, and there is no contract.—MILLER V. DOUVILLE, La., 12 South. Rep. 132.

29. COPYRIGHT—Infringement—Joint Tort-feasors.—Defendants bought certain copyrighted pictures, furnished them to a photogravure company, ordered copies to be made, and gave general directions as to how the work should be done; the company agreeing to take the risk of infringement: Held, that defendants were liable for infringement as joint tort feasors. FISHEL V. LUECKEL, U. S. C. C. (N. Y.), 53 Fed. Rep. 499.

30. CORPORATION — Contracts — Estoppel to Deny Validity—Ultra Vires.— An insurance company by issuing policies and continuing business, after an act amending the charters of such companies, in accordance with a right reserved to the State by the general corporation law, which amendment the company was bound to adopt if it wished to continue business, is estopped to deny its adoption of the amendment, and the consequent operation thereof.—MILLER V. AMERICAN MUT. ACC. INS. CO., Tenn., 21 S. W. Rep. 39.

31. COUNTY COMMISSIONERS—Contracts.— The board of county commissioners of a county, about to be dissolved under operation of law, has no power to enter into a contract designating the official newspaper of the county, and providing for the county printing for another year, so as to tie the hands of the new board, about to meet and organize, and thereby prevent the new board from selecting the official paper and contracting for county printing for the current year after its organization.—ROBSON V. SMITH, Kan., 32 Pac. Rep. 30.

32. CRIMINAL EVIDENCE—Cattle Stealing.—On a trial of defendant for stealing certain cattle belonging to M, defendant attempted to show that M had made a conditional sale of all his cattle to G, and that the property in the cattle at the time of the alleged theft was in G: Held, that it was competent for M to give conversations had between himself and G when defendant was not present, where such conversations merely showed that the conditional sales had been orally rescinded before the alleged theft, and that the property in the cattle was still in M.—STATE V. HUMASON, Wash., 32 Pac. Rep. 111.

33. CRIMINAL EVIDENCE— Confessions. — Where defendant, while under examination by a magistrate on the charge of burglary, after being cautioned, voluntarily admits his guilt, in a statement that is reduced to writing by the magistrate and signed by defendant, such written statement is admissible against him as a confession, even though he was improperly required to be sworn on signing it, and even though the statement was not properly authenticated by the magistrate.—SALAS V. STATE, Tex., 21 S. W. Rep. 44.

34. CRIMINAL EVIDENCE — Declarations. — In a trial for murder by poisoning, the statements of the deceased in narration of past events, voicing her suspicions as to the sender of the poison, are incompetent.—GRAVES V. PEOPLE, Colo., 32 Pac. Rep. 63.

35. CRIMINAL LAW—Appeal—Sentence.— The order of a trial court, fixing a new day for the execution of a death sentence, in conformity with the instructions of the supreme court on the dismissal of an appeal, is not appealable.—STATE V. LEVELLE, S. Car., 16 S. E. Rep. 717.

36. CRIMINAL LAW — Assault. — Where defendant assaulted J with intent to murder, and, when B came to J's assistance, defendant assaulted B with the same intent, the offenses are distinct, and the trial for the assault on J does not prevent a trial on a separate indictment for the assault on B.—ASHTON V. STATE, Tex., 21 S. W. Rep. 48.

37. CRIMINAL LAW — Circumstantial Evidence. — A conviction may rest upon circumstantial testimony alone but the facts and circumstances must be such as are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused. However, where such testimony fairly tends to show the guilt of the defendant, the weight of the same is for the jury; and where the jury has found, after being properly instructed, that the defendant is guilty, and the verdict has been approved by the trial court, it will not be disturbed because of the insufficiency of the evidence. —STATE V. HUNTER, Kan., 32 Pac. Rep. 37.

38. CRIMINAL LAW—Larceny. — Rev. St. 1889, § 3959, provides that, if a person convicted of any offense punishable by imprisonment in the penitentiary "shall be discharged" on pardon or on compliance with the sentence, and shall be convicted of any offense committed after pardon or discharge, and if such subsequent offense be such that on a first conviction the offender would be punishable by imprisonment for a limited term of years, he shall be punished by imprisonment for the longest term prescribed upon a conviction of such first offense: Held, that an indictment charging that defendant was convicted of grand larceny, and sentenced for a term of two years in the penitentiary, and that "he complied with said sentence," and that afterwards he stole a horse, the property of J, was insufficient, in that it fails to aver that defendant was "discharged;" the mere averment that defendant "complied with his sentence" being insufficient.—STATE V. AUSTIN, Mo., 21 S. W. Rep. 31.

39. CRIMINAL LAW—Perjury. — In a prosecution for perjury it is competent to show what witnesses testified to in the cause in which defendant is alleged to have perjured himself, in order to show the materiality of defendant's alleged false testimony, and objection that defendant was not present at the giving of such testimony, and had no opportunity to cross-examine such witnesses cannot be sustained; the evidence being offered to show merely that such testimony had been given, and not to prove the facts stated therein. —PEOPLE V. LEM YOU, Cal., 32 Pac. Rep. 11.

40. CRIMINAL LAW—Pleading Guilty under Duress.—Where the accused in a criminal prosecution in the district court is forced, through well grounded fears of mob violence, to plead guilty to the criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary for a term of years, he has a right to relief from such sentence and plea by an action or proceeding in the same court in the nature of a writ of error *coram nobis*.—STATE V. CALHOUN, Kan., 32 Pac. Rep. 38.

41. CRIMINAL LAW—Theft.—Where an indictment for theft alleged ownership of the stolen property in W, and possession in F, it is reversible error to charge that defendant was guilty if he took the property from out the possession of F, though the ownership was in H.—GANOWAY V. STATE, Tex., 21 S. W. Rep. 46.

42. CRIMINAL PRACTICE — Burglary.—A count in an indictment which charges defendant with the crime of burglary in the form prescribed by volume 2, Code 1886, p. 268, form 20, is not rendered defective by further charging that defendant, after having burglariously

entered the house, feloniously took and carried away therefrom certain moneys and articles of merchandise.—WALKER V. STATE, Ala., 12 South. Rep. 83.

43. CRIMINAL PRACTICE — False Pretenses.—Good pleading requires that an information charging the crime of obtaining money or other property by means of false pretenses should directly and positively negative each distinct material representation alleged to have been made.—STATE V. PALMER, Kan., 32 Pac. Rep. 29.

44. CRIMINAL TRIAL—Jurors.—On his *voir dire* a juror stated that he had no prejudice against defendant, nor had he established in his mind such a conclusion as to his guilt or innocence as would influence his action in finding a verdict, but that he had formed from newspaper accounts an opinion which would require evidence to remove: Held, that the court did not err in overruling a challenge for cause.—ASHTON V. STATE, Tex., 21 S. W. Rep. 47.

45. DEATH BY WRONGFUL ACT—Minor.—The fact that a minor's death was caused by his fellow-servants is a defense to an action brought against his employer by his mother under Code, § 2588, which gives parents a right of action for the death of a minor child, caused by the wrongful act, omission, or negligence of any other person or corporation, his or their servants or agents.—HARRIS V. MCNAMARA, Ala., 12 South. Rep. 103.

46. DECEIT — Judgment.—In an action for deceit, brought against a corporation and two of its officers, for false representations, which induced plaintiff to buy stock, it is proper to instruct the jury that they can find against one of the defendants, or two of them, or all.—LARE V. WESTMORELAND SPECIALTY CO., Penn., 25 Atl. Rep. 812.

47. DEED — Reformation.—Where a sheriff, by mistake, inserts a wrong description in his deed for the land sold by him under mortgage foreclosure, he has an interest, both as an individual and as trustee, to prevent an injury to himself and the grantor in the mortgage because of the mistake, and is a proper party to bring suit in equity to reform the deed.—DODSON V. LOMAX, Mo., 21 S. W. Rep. 25.

48. EQUITY — Rescission of Sale.—An attorney misrepresented to his principal, who resided in another State, the amount of liens on certain property, and the value of the principal's interest therein, and thereby induced the principal to sell at a grossly inadequate price to a supposed third party, with whom the attorney was in fact jointly interested. Another attorney notified the principal of the true condition of affairs within 40 days thereafter, but the principal, to whom the first attorney had written to persuade him that the sale was for his interest, did not return the purchase money, nor announce his intention to repudiate the sale, but remained silent until his death, more than seven years thereafter, during which time the property had greatly increased in value: Held, that he had elected to ratify, and that the sale could not be rescinded by his heirs.—RUGAN V. SABIN, U. S. C. C. of App., 53 Fed. Rep. 415.

49. ESCHEAT — Adverse Possession.—Under Rev. St. art. 1770, which declares that, on the death intestate and without heirs of a person seised of any real estate, it shall escheat to and vest in the State, the title vests in the State by operation of law immediately on the death of such a person; and the succeeding sections, which prescribe the manner in which the escheat shall be established, and which declare that the judgment shall vest the title in the State, are simply means by which the State may furnish authentic evidence of title.—ELLIS V. STATE, Tex., 21 S. W. Rep. 66.

50. ESTOPPEL—Admissions—Pleadings.—Judicial admissions and pleadings by a party in another suit do not operate as an estoppel, but are open to explanation or rebuttal, especially when the fact admitted was not in issue in such other suit, and the pleading was signed without reading.—BLANKS V. KLEIN, U. S. C. C. of App., 53 Fed. Rep. 436.

51. EVIDENCE—Parol Evidence to Explain Record.—It appeared from the minutes of the county commissioners' court that the commissioners therein named were present, but did not say that any one else required by law to constitute a part of the court was not present: Held, that the evidence of the county judge that he was present, and acting with the commissioners, was properly received, as it did not tend to contradict the record, but was simply explanatory of it. — DISTRICT TRUSTEES OF SCHOOL DIST. NO. 1 V. WIMBERLY, Tex., 21 S. W. Rep. 49.

52. EXECUTION SALE—Validity. — Where defendant's title to the land in controversy was acquired by mesne conveyance from a purchaser at an execution sale under a judgment against O, the owner of the land, the judgment and sale being valid, such conveyance vests in defendant a good title, as against a subsequent conveyance from O to plaintiffs.—BUSE V. BARTLETT, Tex., 21 S. W. Rep. 52.

53. FEDERAL COURTS—Supersedeas Bond—Judgment.—Where a judgment of a federal court in Alabama has been affirmed by the supreme court, and the condition of the *supersedeas* bond given under rule 29 of the latter court has been thereby broken, judgment may be had thereon by motion against the sureties, as well as the principal. — THIRD NAT. BANK OF CHATTANOOGA V. GORDON, U. S. C. C. (Ala.), 53 Fed. Rep. 471.

54. FRAUDS, STATUTE OF. — Where plaintiff, as the result of a correspondence by letter and telegraph, enters the employ of defendant for a period of two years, these letters and telegrams constitute a contract or memorandum in writing sufficient to satisfy the statute of frauds. — ELBERT V. LOS ANGELES CO., Cal. 32 Pac. Rep. 9.

55. FRAUDULENT CONVEYANCE. — A conveyance by a debtor of his entire stock of goods, fixtures, etc., followed on the same day by a transfer of all his notes and outstanding accounts, in satisfaction of a debt owing one of his creditors, must be treated as one transaction; and the fact that the value of the entire property so transferred greatly exceeds the amount of the debt is a badge of fraud, as against other creditors, to be passed on by the jury, though the value of the goods, standing alone, is less than the debt, and though the transfer of the notes and accounts be treated simply as a mortgage. — BAYLOR V. BROWN, Tex., 21 S. W. Rep. 73.

56. GARNISHMENT. — In order to charge a garnishee, there must be such a liability on his part to defendant as would enable defendant to maintain his action directly against the garnishee in his own name, and for his own use, and to recover a judgment. — HALLOWELL V. LEAFGREEN, Colo., 32 Pac. Rep. 78.

57. GARNISHMENT — Fraudulent Assignment. — The fact that an assignee of money to become due under a building contract permitted the assignor to receive the money as it became due does not conclusively establish that the assignment is fraudulent as against a creditor of the assignor, who afterwards, by garnishment, attached the amount not yet paid the assignor; nor does it estop the assignee, as against such creditor, from claiming the fund. — ABBOTT V. DAVISON, R. I., 25 Atl. Rep. 839.

58. GUARANTOR—Building Contract. — Where a building contract specifies no time for making payments to the contrator, and the owner is not notified that the contractor is not properly performing his work, a guarantor of the faithful performance of the contract by the contractor is not released by the fact that the owner paid the contractor as he wanted the money.—MILLER V. ECCLES, Penn., 25 Atl. Rep. 776.

59. GUARANTY OF NOTE—Fraud.—Where, in a suit against the guarantor of a note, he alleges as a defense that, misrepresenting the facts to him, and intending to defraud him, plaintiff's agent stated that his signature was desired by his brother in-law, the maker of the note, this allegation is not sufficient to render admissible evidence of fraud.—JAIN V. GIFFIN, Colo., 32 Pac. Rep. 80.

60. GUARDIAN'S BOND—Liability of Sureties.—Where the obligation assumed by a surety for a guardian is that the estate of the infants should be lawfully managed, and restored to them on the determination of the guardianship, and the guardian loans money belonging to the wards which has not been repaid, and the borrower and guardian are both insolvent,such surety is responsible for any delinquencies occurring before he was relieved on his bond and a new bondsman substituted.—BELL V. RUDOLPH, Miss., 12 South. Rep. 153.

61. HOMESTEAD.—Under Const. art. 16, § 51, which exempts from sale on execution the lot or lots used as a place to exercise the calling or business of the head of a family, the lot on which one conducts his livery business, in connection with his hotel and residence, situated on an adjacent lot, is exempt.—SCHNEIDER V. CAMPBELL, Tex., 21 S. W. Rep. 55.

62. HOMESTEAD — Acquisition.—Under Const. 1874, which provides for a homestead in property "owned and occupied as a residence, to be selected by the owner," actual occupancy of land as a place of residence is necessary, to impress it with the character of a homestead.—TILLER V. BASS, Ark., 21 S. W. Rep. 34.

63. HOMESTEAD — Husband's Debts.—Personal property, received from a sale of the homestead of an insolvent debtor, when transferred to his wife to be her separate property in consideration of her consent to the sale, cannot be reached by the husband's creditors. —GATEWOOD V. SCURLOCK, Tex., 21 S. W. Rep. 55.

64. HUSBAND AND WIFE—Rent of Property.—The husband as head of the community, and not the wife, is responsible for rent of property occupied by him and his wife, who is an heir, and has an interest in the property.—SUCCESSION OF DUMESTRE, La., 12 South. Rep. 123.

65. INFANCY — Burden of Proof.—In an action by one claiming to be a minor, against a railroad company, for personal injuries, where defendant pleads that before suit plaintiff, who was then 21 years of age, accepted money in settlement of his claim, and plaintiff joins issue thereon, the burden of proof as to the age of plaintiff at the time of settlement is on plaintiff, the subject-matter being peculiarly within his knowledge. —ROGERS V. DE BARDELABEN COAL & IRON CO., Ala., 12 South. Rep. 81.

66. INTOXICATING LIQUORS — License.—A planter or farmer keeping a store on his plantation, and selling goods and liquors to his employees exclusively, falls under the terms of the law exacting a license from every one "doing a business of selling at retail."—THIBAUT V. KEARNEY, La., 12 South. Rep. 139.

67. JUDGMENT—Certificate of Time.—The clerk of a court of the supreme court has no authority to certify, under the seal of the court, the hour of the day when the judgment was entered. The day may be thus certified, and the presumption will be that the judgment was entered at the earliest hour when it could be entered in the usual course of the business of the office. —HUNT V. SWAYZE, N. J., 25 Atl. Rep. 850.

68. JUDGMENT CREDITOR OF ADMINISTRATOR.—An action by a judgment creditor of an administrator, in the nature of a creditor's bill, will not lie against an heir of the intestate, to subject land of which the latter died seised to the payment of plaintiff's judgment, since the statutes relating to the administration of estates, and the enforcement of the payment of claims against the same, afford a legal remedy.—HUNEKE V. DOLD, N. M., 32 Pac. Rep. 45.

69. LIFE INSURANCE — Tontine Assignment.—Ten members of a life insurance association, each holding a policy for $10,000, executed certain papers, called a "Tontine Assignment," to a "Fiducial Agency;" the scheme being to distribute the proceeds of their respective policies, in case of death, to the survivors: Held, that on the death of one of such members, who had taken out the policy on his own life, and had himself paid the premiums, payment by the association of the amount of the policy to the Fiducial Agency was a valid defense to an action on the policy brought against the company by the heirs and administrators of the deceased member.—HILL V. UNITED LIFE INS. ASS'N., Penn., 25 Atl. Rep. 771.

70. LIMITATIONS — Township Treasurer's Bond. — An action to recover a balance due a township on a treasurer's bond is barred in five years after a demand has been made for its payment by the legally qualified successor of the treasurer who executed the bond.— EL DORADO TP. V. GORDAN, Kan., 32 Pac. Rep. 32.

71. MARRIAGE—Estoppel. — In the county court, petitioner asked to be recognized as the widow of one A, deceased. The evidence showed that she had repeatedly declared that she was married to a second husband before the death of A, her first husband. Petitioner and her second husband admitted on the trial that they had lived and cohabited with each other, and held themselves out to the public, as husband and wife, in the communities where they had so lived, prior to the death of the first husband: Held, that the proof was sufficient to warrant the trial court in finding that plaintiff in error had actually contracted and consummated the marriage between herself and the second husband before the death of the first, and so was debarred from claiming as the widow of her first husband.—ISRAEL V. AUTHUR, Colo., 32 Pac. Rep. 68.

72. MASTER AND SERVANT—Contract of Employment.— In an action by an employee, on a contract of employment for a specified time, to recover damages for a wrongful discharge, the burden is on defendants to show that plaintiff had, or could have had, other employment after his discharge, and neglected to secure it. — ODONEAL V. HENRY, Miss., 12 South. Rep. 154.

73. MASTER AND SERVANT — Fellow-servants. — An assistant foreman is a fellow-servant of a workman who works with him.—MCGINLEY V. LEVERING, Penn., 25 Atl. Rep. 824.

74. MASTER AND SERVANT — Minor Assisting Parent—Negligence.—In an action against a railroad company for personal injuries, it appeared that plaintiff's father was employed by it to load its cars for a specified sum per car, under the control of defendant's superintendent; that plaintiff and his brother, minors, were assisting their father; that the father had gone off to dinner, leaving the boys at work, and they were loading cars when plaintiff was injured. There was evidence that defendant's superintendent, who had authority to employ and discharge hands, told the father to put the boys on the work; that he knew plaintiff was thus employed, made no objection, and directed him as to the manner of doing the work: Held, that the facts were sufficient to support a finding that plaintiff was an employee of defendant, under Code, § 2590, known as the "employer's liability act." — TENNESSEE COAL, IRON & RAILROAD CO. V. HAYES, Ala., 12 South. Rep. 98.

75. MASTER AND SERVANT—Negligence. — In an action for personal injuries, a complaint which states that defendant, a railroad company, at the time and place of the casualty complained of, was in the operation of a railroad; that plaintiff was in its service as switchman; and that, "while in the active discharge of his duties" as such, he received the injuries complained of, — sufficiently sets forth the relationship existing between the parties at the moment of the accident, and is not objectionable as stating the conclusion of plaintiff as to being in the active discharge of his duties.—KANSAS CITY, M. & B. R. CO. V. BURTON, Ala., 12 South. Rep. 88.

76. MECHANIC'S LIEN — Apportionment. — Plaintiff furnished materials for forty-two houses situated on three blocks of land separated from one another by public streets, and filed three liens therefor, one against each block. The same bill of particulars was attached to each claim, and stated that the whole of said materials were furnished for the erection of the forty-two houses. The balance due was apportioned among the blocks and among the houses in each block: Held, that the liens were invalid, since buildings sepa-

rated by a public street are not "adjoining," within the meaning of Act March 30, 1831, which allows one who has furnished materials "for two or more adjoining houses" to file with his claim an apportionment thereof among the said houses.—LUCAS v. HUNTER, Pa., 25 Atl. Rep. 827.

77. MECHANICS' LIEN — Married Woman. — A mechanic's lien against a married woman must show on its face that she is a married woman; that the work or material was necessary for the improvement or repair of her separate estate, and was in fact so applied; and that the erection or repair of the building took place with her consent or authority, or at her request. — WOLFE v. OXNARD, Pa., 25 Atl. Rep. 806.

78. MECHANIC'S LIEN—Sufficiency of Notice. — A lien for materials furnished in the construction of a house will not be enforced when the description in the notice of claim is so defective that the premises cannot be identified by it.—MT. TACOMA MANUF'G CO. v. CULTUM, Wash., 32 Pac. Rep. 95.

79. MECHANIC'S LIEN — Sureties. — The lien of a material man for materials furnished certain building contractors by him cannot be enforced against persons who entered into the original building contract merely as sureties that such contractors would turn over the building to the owner when complete, free from liens; the material also being charged to the contractors, and furnished solely on their credit. — STETSON & POST MILL CO. v. MCDONALD, Wash., 32 Pac. Rep. 108.

80. MECHANICS' LIENS — Waiver by Contractor. — A covenant by a contractor to furnish a clear release of liens, and to refund all money the owner may be compelled to pay in discharging any lien, is not a waiver of lien, so as to prevent a material man from filing a lien against the property for materials furnished the contractor.—EVANS v. GROGAN, Pa., 25 Atl. Rep. 804.

81. MORTGAGES TO SCHOOL FUND.—Const. art. 8, § 5, provides that the governor, secretary of State, and State treasurer shall constitute a board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom: Held, in an action by such officers, as such board, against a local agent, for damages sustained by reason of a false certificate as to the title of land offered as security for a loan, that the petition need not allege the legal capacity of plaintiffs to sue.—PENNOYER v. WILLIS, Oreg., 32 Pac. Rep. 57.

82. MUNICIPAL BONDS—Injunction.—A taxpayer cannot enjoin the issue of bonds voted by a city, but which would be void, even in the hands of a *bona fide* purchaser, for lack of any provision of a sinking fund to pay same when they should mature, as required by charter and article 11 §§ 5, 7, of the constitution, since neither he nor the city could suffer any injury from the issue. — BOLTON v. CITY OF SAN ANTONIO, Tex., 21 S. W. Rep. 64.

83. MUNICIPAL TAXATION—Constitutional Law.—Const. art. 11, § 8, provides that any city of over 100,000 inhabitants, may frame a charter for its own government, consistent with the laws and constitution of the State, which shall be submitted to the legislature; and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city. Const. art. 11, § 12, provides that the legislature shall not impose taxes on cities for municipal purposes, but may, by general laws, vest such power in the authorities thereof: Held, that a city organized under a charter approved by legislature by resolution, and not by bill, may provide in its charter for taxation for municipal purposes, though no general law has been passed by legislature authorizing it to do so, since the power of taxation being essential to municipal existence, such power is necessarily implied.—SECURITY SAV. BANK & TRUST CO. v. HINTON, Cal., 32 Pac. Rep. 3.

84. NEGOTIABLE INSTRUMENT — Complaint— Amendment.—Amendments which change the date, or amount or time of payment of a note, or add or strike out names of parties, are admissible for the purpose of correcting an erroneous statement or imperfect description of the note described in the original complaint, if the identity of the note is preserved, so as to show that the amended complaint is for the same cause of action.—DRAKE v. FOUND TREASURE MIN. CO., U. S. C. C. (Nev.), 53 Fed. Rep. 474.

85. NUISANCE—Injunction.—The operation of a factory for making oil and fertilizers from fish should not be enjoined on the petition of the owner of a summer cottage, distant a mile and a half therefrom, when the family of counsel instigated, directed, and furnished money to carry on the suit; when there is no regular or serious pollution of the water, and the offensive odors have decreased by reason of improved processes so as to be seldom troublesome in the summer; when the cottager has lived in that vicinity 13 years, and in his present house 10 years, while the factory had been in operation 20 years; and when the granting of an injunction would inflict great injury upon the factory owners and many employees, while its denial would injure the cottager but little.—TUTTLE v. CHURCH, U. S. C. C. (R. I.), 53 Fed. Rep. 422.

86. OFFICERS—Powers of Governor. — A suspension from office and appointment to fill the office under section 15 of article 4 of the constitution, do not affect the suspended officer's right to qualify for or exercise the duties of a succeeding term of the same office; nor do they prevent a governor succeeding the one who made the suspension from commissioning the suspended officer for the new term.— IN RE ADVISORY OPINION TO THE GOVERNOR, Fla., 12 South. Rep. 114.

87. OLEOMARGARINE— Sale. — Since Act May 21, 1885 (P. L. 22), prohibits the manufacture and sale of oleomargarine, evidence as to how it is made, or of what it is composed, is immaterial in an action for the penalty imposed for a violation of such act.—COMMONWEALTH v. SHIRLEY, Pa., 25 Atl. Rep. 819.

88. PARTNERSHIP — Agent.—N and S entered into a written agreement that S should take charge of the business (store) as agent and manager for N, and devote his whole time to the carrying on thereof, for which services he should receive one half the net profits after payment of the advances of N and the debts and expenses: Held, that the agreement created no partnership, but that the business was N's with S as his agent.—FAIRLY v. NASH, Miss., 12 South. Rep. 149.

89. PARTNERSHIP—Confession of Judgment.—A partner may bind the firm by a note for a partnership debt with warrant of attorney to confess judgment, and the judgment entered thereon will authorize a levy on the partnership property as well as on the individual property of such partner, though not on the individual property of the other partner.—BOYD v. THOMPSON, Pa., 25 Atl. Rep. 769.

90. PAYMENT—Evidence.—In an action by the maker of a note and trust deed to enjoin a sale under the deed for non-payment of certain interest, on the ground that plaintiff delivered to the mortgagees a note of a third person in payment of such interest, plaintiff must establish that the delivery and acceptance of the note constituted payment by a preponderance of testimony to the satisfaction of the court.—ZOOK v. ODLE, Colo., 32 Pac. Rep. 82.

91. PLEADING AND PROOF — Variance.—There is no variance between an answer describing an obligation due from plaintiff to defendant merely as an indebtedness or loan, and proof that such indebtedness is evidenced by note. — KLEINSCHMIDT v. KLEINSCHMIDT, Mont., 32 Pac. Rep. 1.

92. PRINCIPAL AND AGENT— Negligence of Agent.—Where a mare which is given into a party's keeping for breaking is killed by the negligence of such party's servant or agent while attempting to break her, both the principal and agent are liable, and the owner may sue either or both.—MILLER v. STAPLES, Colo., 32 Pac. Rep. 81.

93. PROCESS—Service.—Where a non-resident voluntarily comes into the State to attend court, and, while so in attendance, he is served with process in a civil

action, such service is sufficient to give the court jurisdiction.—BAISLEY v. BAISLEY, Mo., 21 S. W. Rep. 29.

94. RAILROAD COMPANIES—Accidents at Crossings.—In an action against a railroad company for injuries to plaintiff's decedent, caused by defendant's train striking his wagon at a crossing, the allegation that the decedent saw the train while descending the approach to the crossing when he could not turn to either side, or stop, with safety, does not show that he was guilty of negligence in attempting to cross ahead of the train, where it was also alleged that the approach was very narrow and steep.—INTERNATIONAL & G. N. R. CO. v. KUEHN, Tex., 21 S. W. Rep. 58.

95. RAILROAD COMPANIES—Defective Cars—Damages.—Where a railroad brakeman enters into an agreement with the company waiving all liability for injuries resulting from any infraction of a rule of the company prohibiting brakemen from coupling cars except with a stick, and forbidding them to go between the cars to couple, an order by the brakeman's conductor, directing him to go between the cars to couple whenever he fails in an effort to couple with a stick, is a waiver by the company of the brakeman's agreement—MASON v. RICHMOND & D. R. CO., N. Car., 16 S. E. Rep. 698.

96. RAILROAD COMPANIES—Fires.—In an action to recover for the destruction of a mill set on fire by defendant's locomotive, an instruction that plaintiff could not recover if the fire could have been prevented by the exercise of due and prudent care on the part of plaintiff, is erroneous, as it requires plaintiff to anticipate defendant's negligence, and place his property in a situation to withstand its effect.—MISSISSIPPI HOME INS. CO. v. LOUISVILLE, N. O. & T. R. CO., Miss., 12 South. Rep. 156.

97. RAILROAD COMPANIES—Grade Crossing.—Act June 19, 1871, § 2 (P. L. 1360), which empowers courts of equity to prevent one railroad company crossing the tracks of another at grade, if, in the judgment of the court, it is reasonably practicable to avoid a grade crossing, applies to an electric street railroad seeking to cross at grade the tracks of a steam railroad.—PENNSYLVANIA R. CO. v. BRADDOCK ELECTRIC RY. CO., Pa., 25 Atl. Rep. 780.

98. REAL ESTATE BROKERS—Commission.—Where defendant employed plaintiff to negotiate the sale of a large number of lots, and defendant's wife thereafter refused to sign the deeds, so that defendant could conclude the sale, plaintiff's measure of damages is his expenses in the transaction, and he cannot recover commissions on the lots not sold.—HILL v. JONES, Pa., 25 Atl. Rep. 834.

99. RELEASE BY UNAUTHORIZED AGENT.—Where defendant, without any intention to deceive or wrong any one, and without authority, signs a release for another, whereby a third person is misled to his injury, defendant is liable.—LANE v. CORR, Pa., 25 Atl. Rep. 830.

100. REPLEVIN—Tax Sale.—Mansf. Dig. § 5572, which requires, in replevin, as a prerequisite of an order of delivery to plaintiff, an affidavit that the property "has not been taken for a tax or fine against" him, does not prevent plaintiff from attacking in such action the legality of a seizure or sale for taxes.—CROWELL v. BARHAM, Ark., 21 S. W. Rep. 33.

101. RES JUDICATA—Federal and State Courts.—A final decision by a State court bars a subsequent suit in a federal court on the same cause of action as effectually when the issues involve questions on general commercial law and the general principles of equity, and the like, as when they involve the construction of a State law or constitution, or some local law, usage or custom, and it is immaterial whether the cause was decided as a question of law, on a demurrer to the petition, or after a full hearing on issues of fact.—FULLER v. HAMILTON COUNTY, U. S. C. C. (Tenn.), 53 Fed. Rep. 411.

102. SALE.—In an action for the price of cattle sent by plaintiff to defendant, the question was whether the cattle had been sold to defendant, or merely bailed to him, to be cared for, in contemplation of the sale of plaintiff's farm: Held, that the sale of the farm did not tend to show a sale of the cattle, any more than a bailment, and evidence of such sale was properly excluded.—RODGERS v. CROOK, Ala., 12 South. Rep. 108.

103. SALE ON EXECUTION—Debtor's Heirs.—A sale of land on execution against a deceased debtor is void as against the heirs of the debtor in the absence of a revivor of the judgment against such heirs.—FAISON v. JOHNSON, Miss., 12 South. Rep. 152.

104. SCHOOL BOARD — Election of Members.—The election of members of the school board in cities of the first class will be governed by the provisions of St. ch. 79, relating specifically to school matters, and not by chapter 15, relating to the election of city officers generally; the insertion of "members of the school board" in article 1 § 8, of the latter chapter (the clause providing for the election of all city officers), being ascribed to inadvertence on the part of the legislature.—BEATTY v. WALKER, Okla., 32 Pac. Rep. 53.

105. TAXATION — License — Contractors.—When a mechanic goes outside of his occupation, and employs others in a different pursuit, such as brick masons, painters and slaters, in the erection of buildings, his business is that of contractor, and he is not exempted under article 206 of the constitution, from paying a license tax.—CITY OF NEW ORLEANS v. POHLMANN, La., 12 South. Rep. 116.

106. TAXATION — Occupation License.—When a mechanic is employed to do a particular piece of work,—for instance, to do the carpenter work on a house, or to plaster or to point the same,—and he works at his trade, and employs others to assist him in the work, he is exempt from the license tax in pursuance of article 206 of the constitution.—STATE v. MCNALLY, La., 12 South. Rep. 117.

107. TAXATION FOR COUNTY PURPOSES.—Chapter 134 of the Laws of 1887, authorizing the board of county commissioners of Wyandotte county to levy and collect a tax not exceeding ten mills on the dollar of the taxable property of the county, for general county purposes, is not unconstitutional or void, but is valid, although the general law in force when said chapter 134 was enacted permitted counties such as Wyandotte to levy only five mills on the dollar for such purposes.—MIDLAND ELEVATOR CO. v. STEWART, Kan., 32 Pac. Rep. 33.

108. TAX LIEN — Foreclosure—Notice.—In a suit by a city to foreclose a tax lien, the publication of the notice required by City Ordinance No. 737, § 5, providing "that within three days after filing the roll the clerk shall give notice by publication of such filing," may be shown by any competent proof, where the clerk is not required to preserve the proof in any particular way.—CITY OF SEATTLE v. DORAN, Wash., 32 Pac. Rep. 105.

109. TENDER—Pleading.—A plea of tender must show that the tender was made before the commencement of the action.—LEVAN v. STERNFELD, N. J., 25 Atl. Rep. 854.

110. TRUST — Estate — Administrator.—When an administratrix buys land for herself on her own credit, a trust does not result in favor of the estate by virtue of the subsequent inadvertent application of some of the funds of the estate in part payment of the price, but such a trust can result, if at all, only at the time the title vests.—BOWEN v. HUGHES, Wash., 32 Pac. Rep. 98.

111. TRUSTS—Parol Evidence.—Though a deed purports to convey land to the grantee in fee simple, parol evidence is admissible to show an express agreement that the grantee should hold the land in trust for herself and her sister during their lives or such less time as they might see proper to occupy it as a home, and on their death or abandonment of it as a home it should become the property of their brother, who paid the consideration, as an

express trust is not within the Texas statute of frauds.—HOLLAND V. FARTHING, Tex., 21 S. W. Rep. 67.

112. TRESPASS—Ratification.—Plaintiff's and defendant's lands were separated by a survey line not clearly marked. Defendant sold certain trees to C, and told him that he could cut up to the survey line pointed out to him by J. C cut up to line so pointed out to him, and cut 70 trees on plaintiff's land. Defendant did not know where the true line was, and, when paid for the trees, did not know that any of them had been cut on plaintiff's land. J failed to point out the true line: Held, that trespass *quare clausum fregit* will not lie, since, to make defendant a trespasser by ratification, it must be shown that he ratified it with a full knowledge of the tort.—OSWALT V. SMITH, Ala., 12 South. Rep. 109.

113. USURY.—Where an agent in a loan transaction is agent of the borrower, and not of the lender, the fact that he receives a bonus from the borrower is immaterial to the plea of usury, for what the borrower pays to his own agent for procuring a loan is no part of the sum paid for the loan or forbearance of money.—DRYFUS V. BURNES, U. S. C. C. (Ark.), 53 Fed. Rep. 410.

114. USURY—Mistake.—Though a note given in payment of a pre-existing debt exceeds the amount of such debt, the payee is not guilty of a violation of the usury laws, where it appears that, being very ill, he intrusted the computation of the interest on the old debt to a third person, who drew the note, and that he protested against the excessive interest, and gave positive instructions that the maker should not be held liable for it; since the intent to take usury constitutes the offense.—HENRY V. SANSOM, Tex., 21 S. W. Rep. 69.

115. VENDOR AND PURCHASER—Specific Performance.—Defendant agreed to sell land to R, plaintiff's assignor, on certain conditions as to payment, and R agreed that he would covenant to erect dwelling houses on the land, and commence the same within one year from the date of the contract. Defendant agreed to make and deliver a deed to R in about a month: Held, that a suit by plaintiff for specific performance could not be resisted on the ground that the buildings were not commenced as agreed upon, since R was not bound to commence their direction until defendant should give him a deed.—POMEROY V. FULLERTON, Mo., 21 S. W. Rep. 19.

116. VENDOR AND VENDEE — Auction Sale.—One proposing to purchase at a stated price property advertised for sale at auction, if made to the real-estate agents advertising the sale, and upon the date of such auction sale, must be viewed in the light of a purchaser at auction, and not as a vendee in a conventual contract of sale.—COLLINS V. DEMAREST, La., 12 South. Rep. 121.

AREHOUSEMAN—Lien—Storage.—A warehouseman who retains goods for a general balance of storage under a single contract is entitled to storage at the same rate after the time of asserting his lien until payment is made, and he cannot be deprived of the same on the theory that the storage from that time on is for his own benefit.—DEVEREUX V. FLEMING, U. S. C. C. (S. Car.), 53 Fed. Rep. 401.

118. WATERS AND WATER-COURSES — Floatable Stream.—In an action for injuries to plaintiff's dam, caused by logs belonging to defendant corporation, it did not appear that the part of the stream just above the dam had ever been used for floating logs until so used by defendant, and one witness stated that it was not capable of floating logs unless there was a freshet: Held that it was error to take the case from the jury on the ground that there was no evidence to show that at that point the stream was not a floatable one.—GWALTNEY V. SCOTTISH CAROLINA TIMBER AND LAND CO., N. Car., 16 S. E. Rep. 692.

119. WILLS.—Testator devised "three fifths of the residue of my estate to my daughter. Should she die having no issue living at the time of her death, and without a will disposing of said three-fifths, then I devise and bequeath my daughter's said three-fifths to my grandchildren:" Held, under Code, art. 93, § 314, providing that, "in every will whereby any lands or real property shall be devised to any person, and no words of perpetuity or limitation are used in such devise, the devisee shall take, under and by virtue of such devise, the entire and absolute estate of the testator in such lands or real property," the daughter took an estate in fee simple, defeasible only upon her death without leaving issue living at her decease, or without leaving a will disposing of the estate.—BACKUS V. PRESBYTERIAN ASS'N OF BALTIMORE CITY, Md., 25 Atl. Rep. 856.

120. WILL — Charities — Devise for Hospitality.—A will executed by an orthodox member of the society of Friends directed his trustees to keep his house open "for the reception and entertainment of ministers and others traveling in the service of truth," in the same manner that he and his ancestors before him had dispensed their hospitality: Held that, though the effect of the gift is to relieve others from extending that hospitality which the Friends accept as part of their religious duty and to relieve the society from payment for the traveling expenses and entertainment of members attending its yearly meetings, the trust is not one for charitable or religious uses, but for hospitality alone, and hence is void, under the statute against perpetuities.—KELLY V. NICHOLS, R. I., 25 Atl. Rep. 840.

121. WILL — Construction. — Testator left a money legacy and devise of land to his granddaughter, and in case she should die before or after testator's death, "and leave no child or children, of the descendants of any of her children to survive her, then this legacy and devise to her to revert to" testator's children: Held, where the granddaughter died subsequent to testator, unmarried, and without issue, that the words "child or children or the descendants of any of her children" meant issue, and the legacy was not vested, and should be distributed to testator's children, and not to the granddaughter's administrator.—IN RE GORMLEY'S ESTATE, Penn., 25 Atl. Rep. 814.

122. WILLS—Construction—Trusts.—Rev. St. 1879, § 3938, provides that where any person is seised of lands to the use of another the legal title of the lands is in the *cestui que trust:* Held that, were a testator directed his executor to convert his estate into money, and to invest one third thereof, with the consent of his widow, in lands in Missouri, the income therefrom to "go to and be for the use of" his widow during life, in lieu of dower, and provided that after her death the land should be divided among his children, the executor had control of the lands, so purchased in this State, during the life of the widow, and the legal title thereto remained in him.—PUGH V. HAYS, Mo., 21 S. W. Rep. 23.

123. WILLS—Legatees.—Where testator's estate, both real and personal, is made assets for the payment of certain legacies, the residuary estate is liable for the costs of administration in relation to the legacies.—IN RE HAYS' ESTATE, Penn., 25 Atl. Rep. 822.

124. WILLS—Rule in Shelley's Case.—A testator's bequest of leasehold property to his daughter, "J, her bodily heirs, if any she shall have," subject to an estate for life or widowhood in his widow, vests in J an absolute leasehold estate, the rule in Shelley's case applying as well to leasehold as to freehold property.—SEEGER V. LEAKIN, Md., 25 Atl. Rep. 862.

125. WITNESS — Transactions with Decedents.—In ejectment by the widow of B, as his heir, against the tenants of the heirs of O and such heirs, the latter of whom claim title through an alleged lost deed from B to O, the heirs of O are incompetent as witnesses to establish the deed, under Rev. St. 1889, § 8918.—MESSI MER V. MCCRARY, Mo., 21 S. W. Rep. 16.

## ABSTRACTS OF DECISIONS OF MISSOURI COURTS OF APPEAL.

### ST. LOUIS COURT OF APPEALS.

APPELLATE COURT — Jurisdiction — Amount in Dispute.—In a suit by one of several attaching creditors, wherein interpleader claims to be the owner of and entitled to the possession of the goods levied upon under the different attachments, the total of attaching creditors claims exceeding the sum fixing the jurisdiction of the appellate court, which sum is the amount in dispute, held, that appellate court has no jurisdiction. Transferred to supreme court.—KUH v. GARVIN.

ARTIFICERS' LIENS—Rights of Assignee.—While an artificer has no right to assign his lien for repairs on a chattel, because he has only a right to retain the same, and as independent of the possession of the chattel the lien has no existence, a general assignee under the statute has the right and it is his duty to realize upon all such rights and enforce them and he occupies the same position in that regard as the assignor did. Affirmed.—CODY v. VAUGHAN.

EQUITY — Mutual Mistake — Relief.—There were two liens on a piece of real estate. It was purchased at a sale to satisfy one of them in pursuance of an understanding, between the purchaser at said sale and the other lien holder, that the lien under which the property was sold was the second lien when in fact it was the first, by reason of which mistake the second lien holder did not bid at the sale. The holder of the second lien now seeks equitable relief, held, there was such a mutual mistake as would entitle him to relief. Remanded with directions.—SMITH v. PATTERSON.

EVIDENCE—Impeachment of Witness.—Where a fact has been asserted by a witness in court, whose testimony is sought to be impeached by showing statements made by him out of court diametrically the reverse, held, that the jury cannot disbelieve him, nor consider his assertions of one fact as affirmative testimony of another fact diametrically the reverse. Reversed.—SCHONIGER BROS. v. DAY.

EVIDENCE—Res Gestæ.—The fact at issue being the payment of money by defendant to plaintiff's sister-in-law, pursuant to plaintiff's request, held, error to permit defendant to testify that some time prior to the date of the alleged payment he had written to plaintiff's sister-in-law, that he would come to St. Louis on the day stated in his letter and that she answered that she had received his letter and would meet him at her home, it being no part of the *res gestæ* because the acts testified to were not contemporaneous with the act of payment. Reversed.—GORMAN v. AUERSWALD.

FRAUDULENT CONVEYANCES—Sec. 5170 Rev. St. 1889.—A deed of trust made by insolvent debtors for the preference of some and the possible payment of all their creditors, which shows on its face, or by necessary implication from its terms, that it was contrived to work an indefinite continuation of a partnership business, under the name of a trustee, and under cover of a lien, no definite extension of time being stipulated for as far as the preferred creditors were concerned, while an indefinite extension of time was stipulated for as far as general creditors were concerned, and given for present advances the amount of which rested in the discretion of the preferred creditors, the general creditors being secured only by a possible surplus to be paid into the hands of the insolvent debtor for their benefit, the debtor having the power to fix the time of payment of such creditors, is a fraudulent instrument in law. Reversed.—OLIVER FINNIE GROCER CO. v. MILLER.

INDICTMENT—Sec. 7828, Rev. St. 1889—Roads, Secs. 6932, 6937, Rev. St. 1879.—The running of a mathematical line over the ground does not meet the requirements of Secs. 6932, 6937 of the Rev. St. 1879, which provide that the commissioner shall lay out a road not less than thirty nor more than sixty feet wide, in such manner as to establish a public road for obstruction of which a party may be punished under section 7827, Rev. St. 1889. Reversed.—STATE v. PARSONS.

### KANSAS CITY COURT OF APPEALS.

SALES—Chattels.—Secs. 5180 and 5181, R. S. 1889, have no application in cases of sales of chattels to be paid for in installments, where, by the contract of sale, the title passes to the purchaser. They apply to cases where chattels are sold to be paid for, in whole, in part, in installments and, by the contract of sale, the title is to remain in the seller, until a certain sum is paid.—WURMSER v. SIVEY.

VARIANCE—Pleadings and Proof.—Proof of tender to the agent of defendant is all that is required to support an allegation of tender to the defendant, and does not constitute a fatal variance between the *allegata* and *probata*.—CLYDESDALE HORSE CO. v. BENNETT & SON.

ATTACHMENT BOND — Liability of Bondsmen. — The principal and sureties in an attachment bond containing a condition to "pay all damages and costs that may accrue to any garnishee by reason of the attachment, or any process or proceeding in the suit or of any judgment or process thereon," are liable for costs adjudged in favor of a garnishee summoned (after return of execution unsatisfied on the judgment of plaintiff in the attachment suit), on an execution issued on a judgment against the sureties in the forthcoming bond given by defendant in the attachment suit. The judgment against the sureties on the forthcoming bond takes the place of the judgment against the attached property, Sec. 574 Rev. St., and a notice of garnishment on the execution issued on the judgment is a "process thereon." STATE v. IMMER.

BANKS—Negligence.—Plaintiffs deposited a promissory note with defendant for collection. In an action for damages caused by negligence of defendant in delivering the note to another, whereby plaintiff lost the amount due on the note, held, whether defendant was holding the note as a bailee for reward or as a gratuity, its liability for plaintiffs' loss was the same, under the facts in this case, and that the bank's authority to receive and collect commercial paper for its patrons is necessarily implied from the character of its business, and need not be expressly conferred by charter. KEYES v. BANK OF HARDIN.

CHATTEL MORTGAGE—Creditors.—An oral agreement entered into between mortgagor and mortgagee of chattels, at the time of executing the mortgage, that mortgagor should sell, in the usual course of trade, the merchandise covered by the mortgage, and keep all the proceeds of such sales for his own use, except enough to pay mortgagee's debt, renders the mortgage fraudulent and void as to other creditors. HELM v. HELM.

CORPORATIONS—Mandamus. — The ordinance under which defendant operated its works fixed the maximum price of water to the consumer at 25 cents per 1,000 gallons, and gave to the consumer the election either to accept the water to be furnished at the "approximated" prices fixed by the ordinance, or to place a meter upon his premises, at his own expense, and pay, not exceeding 25 cents per 1,000 gallons, for water actually used. Plaintiff provided his residence with a meter, pipes, etc., to supply it with water from defendant's mains, and applied to the company to turn on the water, accompanying his application with a tender of all necessary charges. In an action in *mandamus*, held, plaintiff was entitled to have water turned into his residence to be paid for as per meter measurement, and that *mandamus* was the proper remedy.—STATE v. THE JOPLIN WATER CO.

CORPORATIONS — Stockholders—Right of Vote.—The right of a stockholder to cast a cumulative vote, as authorized by Art. 12, Sec. 6, Const. and Sec. 2490, Rev. St. 1889, is guarantied by law. It is personal to the stockholder, and can be exercised or not as he may elect. It cannot be taken from him by a resolution, or by law adopted by a majority of stockholders, and it cannot be affected by mere silent acquiescence in the acts of others.—TOMLIN v. THE FARMER'S & MERCHANT'S BANK.